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IN THE

Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. and NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a letter issued by the Office of the Comptroller of the Currency after formal notice-and-comment proceedings opining that state insurance consumer protection regulations are preempted by Section 104(d)(2)(A) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6701, has any legal force or effect?

Whether state insurance consumer protection regulations that regulate the manner in which bank-related insurance sales, solicitation or cross-marketing activities are conducted but that do not undermine the core ability to engage in such activities are preempted by Section 104(d)(2)(A) of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6701?

Whether a court's wholesale adoption of an informal agency opinion letter without conducting an independent analysis of the underlying legal question(s) is permissible?

PARTIES TO THE PROCEEDINGS

Petitioners are two trade associations organized for the benefit of insurance agents and their customers. Petitioner the Independent Insurance Agents and Brokers of America, Inc. is a voluntary, professional association representing over 300,000 independent insurance agents and agency employees licensed by every State to engage in insurance activities throughout the country. Petitioner the National Association of Professional Insurance Agents, Inc. is a not-for-profit organization, representing approximately 180,000 insurance professionals licensed by every State to market and sell insurance. Petitioners' members regularly solicit, negotiate and complete applications for all lines of insurance, collect insurance premiums, and earn commissions for such services. Their members compete against national banks and their operating subsidiaries in the sale of insurance in West Virginia and other States.

Respondent John D. Hawke is the Comptroller of the Currency and is named herein in his official capacity. The Comptroller administers the provisions of federal law regulating national banks. Respondent the Office of the Comptroller of the Currency is a duly constituted agency of the United States charged with the responsibility of administering, enforcing, and regulating the activities of national banks.

RULE 29.6 STATEMENT

Petitioner the Independent Insurance Agents and Brokers of America, Inc. does not have a parent company nor does any publicly held company own 10% or more of its stock.

Petitioner the National Association of Professional Insurance Agents, Inc. does not have a parent company nor does any publicly held company own 10% or more of its stock.

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JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners the Independent Insurance Agents and Brokers of America, Inc. and the National Association of Professional Insurance Agents, Inc. respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this action.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fourth Circuit, of concurring Circuit Judge Luttig and of dissenting Circuit Judge King were entered on November 19, 2002; are

unreported; and are reproduced in Appendix A to this Petition ("Pet. App. A") at 1a. The Court of Appeals order denying a timely petition for rehearing was entered on February 21, 2003; is unreported; and is reproduced at Pet. App. B at 20a. The opinion of the Court of Appeals for the First Circuit that conflicts with the decision in this case was entered on February 13, 2003; is reported at 320 F.3d 59; and is reproduced in Pet. App. C at 22a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on November 19, 2002. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 21, 2003. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Section 104 of the Gramm-Leach-Bliley Act ("GLBA"), 15 U.S.C. § 6701, is set forth in full at Pet. App. E at 81a. GLBA Section 301, 15 U.S.C. § 6711, is set forth in full at Pet. App. E at 93a. GLBA Section 305, 12 U.S.C. § 1831x, is set forth in full at Pet. App. E at 94a. West Virginia Code ("W. Va. Code") Section 33-11A-6 is set forth in full at Pet. App. F at 104a. W. Va. Code Section 33-11A-10(a) is set forth in full at Pet. App. F at 105a. W. Va. Code Section 33-11A-14 is set forth in full at Pet. App. F at 106a.

STATEMENT OF THE CASE

The judgment entered by the Fourth Circuit is squarely in conflict with the judgment entered by the First Circuit in *Bowler v. Hawke*, 320 F.3d 59 (1st Cir. 2003) (*reprinted in* Pet App. C at 22a). The Fourth Circuit's judgment also is squarely in conflict with this Court's decisions in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The issues presented here are of significant importance because

the conflict between the First and Fourth Circuits directly affects at least 15 other States that have laws substantively identical to one or more of the three West Virginia provisions at issue. The conflict also fundamentally undermines the "functional regulation" mandate incorporated into the landmark Gramm-Leach-Bliley Act ("GLBA"),[1] and creates confusion with respect to the appropriate roles of state and federal regulators vested with authority under that statute. For the reasons delineated below, Petitioners urge the Court to grant this petition and resolve these conflicts.

A. The Issues Presented

This case involves the authority of every state insurance department to exercise its traditional police power to regulate the sale of insurance within the State's borders. As recognized by the courts and Congress, regulation of the business of insurance has been reserved for the States. Congress reaffirmed this commitment to state regulation of the business of insurance when it enacted the GLBA. The GLBA was landmark legislation that removed many of the barriers that historically had existed separating the banking, securities and insurance industries. In the course of eradicating these barriers, however, Congress also mandated that the insurance sales activities of everyone—including national banks—will continue to be regulated by the States, and it constructed a carefully considered legislative framework in an effort to accomplish this objective.

In so doing, Congress imposed only one limitation on the States' regulatory authority to regulate insurance sales activities, dictating that, "[i]n accordance with the legal standards for preemption set forth in . . . *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), no State may . . . prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage . . . in

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[1] Pub. L. No. 106-102, 113 Stat. 1338 (1999).

any insurance sales, solicitation, or cross-marketing activity." GLBA § 104(d)(2)(A), 15 U.S.C. § 6701(d)(2)(A), Pet. App. E at 83a.

After the issuance of the *Barnett* opinion but well before the enactment of the GLBA, the State of West Virginia enacted the West Virginia Insurance Sales Consumer Protection Act, W. Va. Code §§ 33-11A-1, *et seq.*, in an effort to undermine the coercive pressures credit applicants feel to purchase required insurance from their potential lenders and to minimize the confusion that bank customers often experience when uninsured products are sold by federally-insured depository institutions.[2] At least 16 other States enacted similar legislation for the same reasons.[3]

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[2] In the GLBA, Congress itself recognized the need for such regulation, requiring the federal banking agencies to promulgate "antitying and anti-coercion rules applicable to the sale of insurance" by federally-chartered lenders, 12 U.S.C. § 1831x(b), and rules requiring the "separation of banking and non-banking activities." 12 U.S.C. § 1831x(d), *see* Pet. App. E at 94a. In adhering to the core "functional regulation" mandate, the States retain the power to override these rules by imposing either more or less protective requirements. 12 U.S.C. § 1831x(g)(2)(B)(iii), Pet. App. E at 94a.

[3] *See* Ark. Code Ann. §§ 23-66-606(2) (physical separation); Colo. Rev. Stat. §§ 10-2-607 (physical separation); Ga. Code Ann. § 80-5-4 (physical separation); 215 Ill. Comp. Stat. Ann. 5/1413 (personnel and physical separation); Ind. Code Ann. § 27-1-38-7(12) (physical separation); La. Rev. Stat. Ann. §§ 22:3056, 22:3060 (personnel and physical separation); Me. Rev. Stat. Ann. tit. 24-A, § 2168-B (timing of solicitation); Mass. Gen. Laws Ann. ch. 167F, §§ 2A(3) (personnel and physical separation), (4)(ii) (timing of solicitation); Mich. Comp. Laws Ann. §§ 500.1243(21)(a) (timing of solicitation), 500.1243(13) (personnel separation), 500.1243(19) (physical separation); N.H. Rev. Stat. Ann. § 406-C:7(I) (physical separation); N.M. Stat. Ann. §§ 59A-12-10(P) (timing of solicitation), 59A-12-10(Q) (personnel separation), 59A-12-10(U) (physical separation); 40 Pa. Cons. Stat. Ann. § 287(a) (physical separation); R.I. Gen. Laws §§ 27-58-8 (personnel separation), 27-58-12 (physical separation); Tenn. Code Ann. § 56-8-106(a)(2) (timing of

In the decision at issue, the Court of Appeals concluded that an OCC letter opinion finding that validly-enacted West Virginia insurance sales consumer protection laws are preempted by GLBA Section 104(d) prohibits the State from enforcing those laws, and is entitled to be given essentially unlimited deference. This decision is incorrect for two primary reasons. First, in reviewing a virtually identical OCC letter opinion opining that similar Massachusetts insurance laws are preempted, the First Circuit squarely held that such a letter is purely advisory because the OCC has no delegated interpretive authority under Section 104, and such a letter therefore should have no effect on the State's ability to enforce its insurance laws. Second, the court's unbridled deference to the OCC's preemption opinion was clear error both because the OCC's underlying interpretation of whether a state law "prevents or significantly interferes with" a national bank's ability to engage in insurance sales, solicitation or cross-marketing activities clearly conflicts with this Court's decision in *Barnett*, and because the Fourth Circuit's wholesale adoption of that OCC preemption opinion without any independent analysis clearly is impermissible under this Court's deference jurisprudence.

B. Regulatory Framework

1. State Regulation of Insurance

Prior to 1944, "the States enjoyed a virtually exclusive domain over the insurance industry." *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 539 (1978). This regime of exclusive state regulation existed since at least 1869, when the Supreme Court decided *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), and held that "[i]ssuing a policy of

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solicitation); Tex. Ins. Code Ann. §§ 21.21-9(3)(c) (timing of solicitation and personnel separation), 21.21-9(6) (physical separation); Wyo. R. & Reg. ch. 27, § 8 (physical separation).

insurance is not a transaction of commerce" and is "governed by the local law." *Paul*, 75 U.S. at 183. Subsequent cases affirmed this principle by holding that the entire business of insurance was not interstate commerce subject to regulation by Congress. *See, e.g., Hooper v. California*, 155 U.S. 648, 653 (1895); *Nutting v. Massachusetts*, 183 U.S. 553, 556 (1902).

All this changed in 1944 with the Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance companies are engaged in interstate commerce and are therefore subject to the federal antitrust laws. The decision, "naturally, was widely perceived as a threat to state power to tax and regulate the insurance industry." *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 499-500 (1993). Congress thereafter quickly enacted the McCarran-Ferguson Act ("McCarran"). *See FTC v. Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). Passed at the urging of the state insurance regulators, McCarran "provides that regulation of the insurance industry is generally a matter for the States." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 780 (1993).

2. National Bank Sales of Insurance

In 1863, Congress enacted legislation authorizing the federal chartering of banks empowered to issue and to accept a uniform national currency.[4] The law was revised in 1864 to create the National Bank Act ("NBA"). "National banks, being creatures of statute, possess only those powers conferred upon them by Congress." *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 640 (D.C. Cir. 2000). Until 1916, national banks generally were prohibited from engaging in non-banking activities, including the sale of insurance. *See, e.g., id.* at 643-45 (noting same).

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[4] Bray Hammond, *Banks and Politics in America* 723 (1957).

In 1916 in response to a request of the then-Comptroller of the Currency, Congress enacted a narrow amendment to the Federal Reserve Act of 1913 authorizing small town national banks to engage in insurance agency activities. *See* Act of Sept. 7, 1916, ch. 461, 39 Stat. 752; *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439 (1993).[5] The amendment provides that national banks "located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State . . ." Federal Reserve Act § 13, 12 U.S.C. § 92 ("Section 92").

In 1996 in *Barnett*, this Court addressed whether a State's regulatory authority over small-town national bank insurance sales under Section 92 permitted a State to prohibit national banks from selling insurance in small towns. The *Barnett* Court concluded that it could not, holding that any such prohibition is preempted by Section 92. *Barnett*, 517 U.S. at 32-33, 37-38. In reaching this conclusion, though, *Barnett* made clear that "[t]o say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett*, 517 U.S. at 33.

3. The Gramm-Leach-Bliley Act

Enacted on November 13, 1999, the GLBA was designed to accomplish two overarching objectives—to remove the

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[5] A statutory amendment was required to grant this power because – as the then-Comptroller himself recognized—"'[n]ational banks [we]re not given either expressly nor by necessary implication the power to act as agents for insurance companies[.]'" *Hawke*, 211 F.3d at 641 (*quoting* 53 Cong. Rec. 11,001 (1916)).

barriers that long had existed separating the banking, insurance and securities industries and, at the same time, to preserve the separate regimes regulating each of these distinct financial activities.[6]

In an effort to accomplish these dual objectives, the Act does not empower national banks to engage directly in any new activities. It instead authorizes a bank holding company to engage in insurance, securities and other activities that are "financial in nature" if it demonstrates that all of its depository institution subsidiaries are "well capitalized," "well managed," and in "satisfactory" compliance with the requisite obligations imposed under the Community Reinvestment Act. 12 U.S.C. § 1843(j)(4) (as amended by GLBA § 103). Likewise, a national bank demonstrating compliance with similar requirements may own all or a part of a "financial subsidiary" that engages in insurance, securities or other activities that are deemed "financial in nature" except that such "financial subsidiaries" may not engage in insurance underwriting and certain other specified activities. 12 U.S.C. § 24a(a) (added by GLBA § 121(a)(2)).

Although the OCC is authorized to determine whether a national bank is eligible to establish a "financial subsidiary" and the parameters of the eligibility criteria, *see id.*, its authority is limited in three important respects. First, the OCC has no authority to determine the scope of the activities in which such a "financial subsidiary" may engage—that authority is reserved exclusively to the Federal Reserve. *See* 12 U.S.C. § 24a(b)(1). Second, the primary regulator of the financial relationship between the bank and its "financial

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[6] GLBA § 101 repealed the Glass-Steagall Act, Section 20 of the Banking Act of 1933, 12 U.S.C. § 377, which had prohibited bank holding companies from engaging in securities activities; GLBA § 102 amended Section 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(c)(8), to remove the prohibition on bank holding companies engaging in general insurance sales and underwriting activities.

subsidiary" also is the Federal Reserve. *See* 12 U.S.C. § 371c(e) (as amended by GLBA § 121(b)).[7]

Third, the Act mandates that the insurance and securities activities of national bank "financial subsidiaries" and "financial holding companies" are to be regulated by the pre-existing regulatory regimes that historically have overseen these activities. Under this "functional regulation" approach, securities regulators continue to be charged with regulating securities activities (regardless of the type of entity engaging in those activities), and state insurance regulators continue to be charged with regulating insurance activities (regardless of the type of entity engaging in such activities).

With respect to insurance, the GLBA explicitly "recogniz[es] the primacy and legal authority of *the States* to regulate the insurance activities of all persons." *See* H.R. Rep. No. 106-434 at 156 (1999), *reprinted in* 1999 U.S.C.C.A.N. 245, 251 (emphasis added). The Act implements its state insurance "functional regulation" mandate primarily through four separate provisions:

> Section 104(a), declaring that the McCarran-Ferguson Act "remains the law of the United States," 15 U.S.C. § 6701(a), Pet. App. E at 81a;
>
> Section 104(b), dictating that "[n]o person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required" under the applicable state law, 15 U.S.C. § 6701(b), Pet. App. E at 81a;

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[7] For such purposes, the "financial subsidiary" "shall be deemed to be an affiliate of the bank" and not a "subsidiary of the bank." As a result, for transactions between a national bank and its financial subsidiary, the financial subsidiary is not treated as a component of the bank but as a separate—although commonly owned—entity. *See also* 12 U.S.C. § 1971 (as amended by GLBA § 121(c)) (same under Bank Holding Company Act anti-tying restrictions).

Section 301, reiterating that "[t]he insurance activities of any person (including a national bank exercising its power to act as agent under [Section 92]) shall be functionally regulated by the States," 15 U.S.C. § 6711, Pet. App. E at 93a; and

Section 305, requiring the "Federal banking agencies" [8] to promulgate a series of bank insurance sales consumer protection regulations delineated in the statute but dictating that those regulations are inapplicable to bank sales of insurance in any State that "has in effect statutes, regulations, orders or interpretations, that are inconsistent with or contrary to the regulations prescribed by the Federal banking agencies." 12 U.S.C. §§ 1831x(g)(1) and (g)(2)(A) (as added by GLBA § 305), Pet. App. E at 94a.[9]

The sole limitation on the States' insurance regulatory authority under the Act for laws in force prior to September 3, 1998—including the laws at issue in both this case and in *Bowler v. Hawke*—is Section 104(d), which prohibits a State from imposing any insurance regulation that would "prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage . . . in any insurance sales, solicitation, or cross-marketing activity." GLBA § 104(d)(2)(A), 15 U.S.C. § 6701(d)(2)(A), Pet. App. E at 83a.[10]

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[8] The "Federal banking agencies" are the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision. 12 U.S.C. § 1813(q).

[9] Although the Federal banking agencies can preempt any state regulation they jointly determine is less protective than one of the federal requirements, the Act empowers the States to override such preemption determinations and thus accords the States the last word on such questions. *Id.* § 1831x(g)(2)(B)(iii).

[10] For laws enacted after September 3, 1998, a separate "nondiscrimination" provision also applies. *See* GLBA § 104(d)(2)(C)(ii), 15 U.S.C. § 6701(d)(2)(C)(ii), Pet. App. E at 88a. This provision is not

Two facets of this provision are noteworthy. First, it is not national bank specific—it governs state regulation of the insurance sales, solicitation and cross-marketing activities of *all* depository institutions and their affiliates. Second, it expressly incorporates the "prevent or significantly interfere" preemption standard of the Barnett case. The explicit reference to Barnett is reinforced by Section 104(d)(2)(C)(iii)(I), which makes clear that "nothing in this section [104(d)] shall be construed . . . to limit the applicability of the decision" in *Barnett*.[11]

4. The West Virginia Statutes At Issue

On April 14, 1997, the State of West Virginia enacted the three consumer protection provisions at issue in this case: (1) the "personnel separation" requirement, which dictates that, except in "small banks," insurance sales personnel must not engage in banking activities, W. Va. Code § 33-11A-6; Pet. App. F at 104a; (2) the "timing of solicitation" requirement, which dictates that a bank may not solicit the purchase of insurance related to a loan from a customer while his or her loan application is pending, W. Va. Code § 33-11A-10(a); Pet. App. F at 105a; and (3) the "physical separation" requirement, which dictates that, except in "small banks," the place from which insurance solicitations or sales take place must be separate and distinct from the deposit taking and lending

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applicable to the state consumer protection laws in dispute either in this case or in *Bowler v. Hawke*.

[11] Section 104(d)(2)(B) lists 13 types of state regulations (so-called "safe harbors") not subject to any preemption test. But GLBA also dictates that no inference may be drawn regarding whether a state insurance sales regulation excluded from the list is preempted. GLBA § 104(d)(2)(C)(iii)(II), 15 U.S.C. § 6701(d)(2)(C)(iii)(II), Pet. App. E at 88a.

areas of the bank, W. Va. Code § 33-11A-14; Pet. App. F at 106a.[12]

These provisions apply to any person engaged in the sale of insurance and banking products. W. Va. Code § 33-11A-3(c) ("financial institution" includes any entity that accepts deposits and makes loans to residents of West Virginia, and any employee, agent or affiliate of such an entity); Pet. App. F at 103a.[13] Failure to comply with these or other provisions of the West Virginia Act can result in the suspension or revocation of an insurance agency's insurance license. W. Va. Code § 33-12-25(a); Pet. App. F at 106a.

C. Proceedings Below

On May 8, 2000, the West Virginia Bankers Association ("WVBA") submitted a letter to the OCC requesting that several of the provisions included in the West Virginia Act be preempted under Section 104(d)(2) of the GLBA. On June 2, 2000, the OCC published notice of the request for comment.[14] On October 9, 2001, the OCC issued its "Preemption Opinion" in response to the WVBA request. 66 Fed. Reg. 51,502 (Oct. 9, 2001), Pet. App. D at 30a. In that Opinion, the OCC first found that the provisions at issue regulate insurance sales, solicitation or cross-marketing activities, and

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[12] Two "small bank" provisions create separate personnel and physical separation rules for bank offices at which 3 or fewer employees are working and allow any bank that believes it is disadvantaged by either or both requirements to apply for a waiver. W. Va. Code § 33-11A-6, Pet. App. F at 105a; § 33-11A-14, Pet. App. F at 106a.

[13] Any insurance agent engaged in banking activities thus must comply with the West Virginia requirements. Petitioner IIABA, for example, has been granted a thrift charter for InsurBanc—a financial institution designed to enable insurance agency members of the association to offer banking products to their customers. When they do so in West Virginia, they are bound by these requirements.

[14] Petitioners filed comments in response to the notice. *See* Pet. App. G at 108a.

that they are not protected from preemption by the Section 104(d)(2)(B) safe harbors. *See* Pet. App. D at 62a-66a, 76a-79a. The OCC then concluded that the provisions at issue are preempted under the Section 104(d)(2)(A) "prevent or significantly interfere with" test, characterizing that inquiry as necessitating a finding of preemption *unless* the state statutes have "only a small effect on the national bank's exercise of" its insurance sales powers. Pet. App. D at 40a-41a.

The West Virginia Insurance Commissioner and the State of West Virginia initiated the proceedings below in the Fourth Circuit under Section 304 of the GLBA, 15 U.S.C. § 6714. Section 304 permits a federal or state regulator to seek expedited judicial review in a U.S. Court of Appeals in the event of a "regulatory conflict between a State insurance regulator and a Federal regulator regarding insurance issues, including whether a State law . . . is properly treated as preempted under Federal law." 15 U.S.C. § 6714(a). Petitioners intervened in the Fourth Circuit in support of the State, arguing both that the OCC's Opinion lacked effect, and that it erred in its determination in any event.[15]

The Fourth Circuit dismissed the petition, specifically holding that the OCC has "implicit interpretive authority" under the GLBA, that the Preemption Opinion constituted binding authority with the force and effect of law, and that, on review, it was entitled to deference. Pet. App. A at 5a-9a.

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[15] Because of the manner in which the Preemption Opinion undermines the State of West Virginia's ability to enforce the provisions the OCC opined were preempted and because—as the OCC itself recognized in the body of that opinion—national banks likely would act in accordance with that opinion and not comply with those requirements, Pet. App. D at 37a, Petitioners also previously had filed a separate challenge to that opinion in the United States District Court for the District of Columbia, *Insurance Agents of America, Inc. et. al v. Hawke*, No. 01-CV-02356 (D.D.C. filed November 13, 2001).

REASONS FOR GRANTING THE WRIT

I. THERE IS A SQUARE CONFLICT BETWEEN THE FIRST AND FOURTH CIRCUITS ON AN IMPORTANT QUESTION OF FEDERAL LAW

The fundamental disagreement between the First and the Fourth Circuits is whether the OCC has any interpretive authority under GLBA Section 104(d)(2) and thus whether an OCC letter opining that a state insurance law is preempted under that provision has any force or effect. The Fourth Circuit held that the OCC does have "implicit interpretive authority" under the GLBA because "Congress previously granted explicit interpretive authority to the OCC under § 92 of the [National Bank Act]" and "[t]he GLBA, in essence, expands the scope of § 92 to permit national banks to engage in insurance sales nationwide." Pet. App. A at 6a.[16] Based on this holding, the court concluded that such an OCC letter opinion has the full force and effect of law, and the promulgation of the OCC Preemption Opinion thus prohibits West Virginia from "enforc[ing] certain provisions of its

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[16] This short statement is replete with error; three are particularly noteworthy. First, Section 92 is not part of the National Bank Act but was adopted as an amendment to the Federal Reserve Act. *See supra* at 6-7 (citing Act of Sept. 7, 1916, 39 Stat. 752; *U.S. Nat'l Bank of Oregon v. Independent Ins. Agents of America*, 508 U.S. 439 (1993)). Second, the GLBA does not grant national banks any direct insurance agency powers; it does empower a national bank to operate "financial subsidiaries" if it satisfies certain requirements, but the Federal Reserve is charged with regulating the scope of those powers and the manner in which they are exercised, not the OCC. *See supra* at 8-9 (discussing same). Third, even with respect to Section 92, the GLBA did not expand the OCC's regulatory authority over the insurance agency activities of "small town" national banks but curtailed it, specifically subjecting such activities to state regulation and specifically limiting the exercise of that state regulatory authority only as dictated under Section 104(d)(2). *See* GLBA § 301, 15 U.S.C. § 6711.

insurance laws against national banks" unless that Preemption Opinion is overturned by a court. Pet. App. A at 4a.

As Judge King admonished in his dissent, however, "the OCC does not possess, nor does it claim, a role in implementing GLBA." Pet. App. A at 12a. Because the OCC has been delegated no authority whatsoever to interpret or apply Section 104(d)(2), Judge King thus asserted that the OCC Preemption Opinion is merely advisory and should have no effect on the ability of the State of West Virginia to enforce its insurance sales regulations Pet. App. A at 12a-13a.

The First Circuit agreed with Judge King, finding that—as "the OCC implicitly conceded"—"Congress did not authorize [the OCC] to effect specific GLBA § 104(d)(2) preemptions through administrative conduct . . . that carries the force of law."[17] *Bowler*, 320 F.3d at 62, Pet. App. C at 26a-27a. On that basis, the First Circuit therefore concluded that the OCC preemption letter opining that similar provisions of Massachusetts law are preempted under Section 104(d)(2)(A) (including a "timing of solicitation provision" identical to the one at issue in West Virginia) constitutes "no more than informal agency guidance" that has no legal impact on the ability of Massachusetts to enforce the challenge provisions or on whether national banks are required to comply with those provisions. *Id.* at 63, Pet. App. C at 27a. On that basis, the First Circuit concluded that the Massachusetts challenge to the OCC preemption letter did not create a justiciable case or controversy, and dismissed it. *Id.*[18]

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[17] As this Court explained in *Louisiana Public Svc. Comm'n v. FCC*, 476 U.S. 355, 374 (1986), "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it").

[18] Ironically, both the Fourth and First Circuits dismissed the Petitions for Review of the OCC's preemption opinions but for diametrically different reasons—the Fourth Circuit because the West Virginia opinion letter has full force and effect and is valid; the First Circuit because the

These conflicting decisions result in a fundamental inequity. The ultimate arbiter of the appropriate level of consumer protection is determined by the State in the First Circuit, as Congress intended. In West Virginia, however, the OCC's view of the appropriate level of protection for insurance consumers is paramount, and national banks are excused from compliance with validly enacted state consumer protection laws to which all other financial institutions in the State must adhere. In contrast, in Maine, Massachusetts, New Hampshire, and Rhode Island—all of which have laws in place similar to those in West Virginia, *see supra* at n. 3—the OCC's view is irrelevant, and these States have express judicial authorization to enforce the same laws that West Virginia can no longer. And the 14 other States with such laws in place, *see id.*, lack guidance as to whether their own laws remain enforceable.

If unresolved, this conflict also threatens to disrupt in several significant respects the bedrock principle of "functional regulation" on which the GLBA is grounded. First, the GLBA's "functional regulation" regime is intended to ensure that *all persons or entities* engaged in insurance sales, solicitation and cross-marketing activities are subject to the *same* panoply of state insurance regulation. At least three aspects of the statute make that clear: (1) the reaffirmation of the McCarran-Ferguson Act in Section 104(a), 15 U.S.C. § 6701(a), Pet. App. E at 81a; (2) the express requirement that no one—including a national bank—is exempt from pertinent state insurance agency licensing requirements in Section 104(b), 15 U.S.C. § 6701(b), Pet. App. E at 81a; and (3) the Section 301 "functional regulation" mandate, 15 U.S.C. § 6711, Pet. App. E at 93a.

OCC Massachusetts opinion letter has no force or effect and any challenge thereto thus does not create a justiciable case or controversy.

Second, this conflict threatens to undermine the States' role as the GLBA functional regulator for insurance sales activities and their concomitant ability to promulgate and enforce laws regulating the manner in which the insurance business is conducted within their borders. Congress' commitment in the GLBA to continued regulation of insurance agency activities by the States, however, could not have been more clear. Nothing demonstrates this more than Section 305's express disavowal of any intent to limit or otherwise affect "any authority of any State insurance commission," 12 U.S.C. § 1831x(g)(1)(B), Pet. App. E at 100a, and the great lengths to which Congress went to ensure that state regulation is paramount and can displace federal consumer protection standards even when the federal standards are more protective. *See* 12 U.S.C. § 1831x(g)(2)(B), Pet. App. E at 101a.

Finally, unless this conflict is resolved, the application of conflicting standards to the types of consumer protections implicated here threatens to dismantle the entire body of important state consumer protection regulation that has been in place in the States for well over a century. That state law erosion, moreover, would be in direct contravention of Congress' stated preference in the GLBA for having such laws in place in the insurance context. *See, e.g.*, GLBA § 305, 12 U.S.C. § 1831x (requiring the Federal banking agencies to promulgate "backstop" consumer protection regulations applicable to bank-related insurance agency activities in States that do not have "inconsistent" requirements), Pet. App. E at 94a.

For these reasons, this Court's resolution of this square conflict is essential.

II. REVIEW IS WARRANTED ALSO BECAUSE THE DECISION BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

The sum total of the Fourth Circuit's substantive review of the OCC Preemption Opinion in this case consists of two paragraphs. In the first of these two paragraphs, the court concludes that the OCC's consideration of the preemption question was "thorough" because the OCC relied on comments received during a formal notice-and-comment period and because the OCC "consulted with" the West Virginia Insurance Commissioner prior to its issuance of the Preemption Opinion. Pet. App. A at 8a. In the two- sentence discussion included in the second of these two paragraphs, the court first briefly notes without analysis the OCC findings that the provisions at issue "disrupt bank operations," "increase bank operating costs" and "substantively affect a bank's ability to sell and solicit insurance products," and the OCC conclusion that the provisions thus "prevent or significantly interfere with a bank's ability to engage in insurance sales, solicitation or cross-marketing activities." Pet. App. A at 8a-9a. The court then summarily concludes that the Preemption Opinion reasoning was "valid" and therefore satisfies the *Skidmore* standard for persuasiveness, thus apparently affirming the OCC determination that the West Virginia provisions at issue are preempted. *Id.* (*citing Skidmore*, 323 U.S. at 140).[19]

The underlying OCC analysis adopted by the court, however, conflicts with this Court's decision in *Barnett*—the decision on which the Section 104(d)(2)(A) preemption standard expressly is based but which the court never once

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[19] Judge Luttig's terse concurrence is no more illuminating, as he notes only that he concurs with the judgment of the court and, "for the reasons stated in the OCC opinion letter and those articulated by counsel for the OCC during oral argument, that the West Virginia provisions at issue are preempted under federal law." Pet. App. A at 10a.

cites in the course of its analysis. The court also failed to undertake the level of judicial review mandated by this Court's deference jurisprudence. This latter error is especially egregious here because at one level this is a case of first impression. Specifically, it is the first post-*Barnett* (and post-GLBA) case in which a court had the opportunity to apply the "prevent or significantly interfere" preemption test to a challenged state insurance regulation that did not actually prevent national banks from engaging in insurance agency activities.

A. The Fourth Circuit Judgment Conflicts With *Barnett*

The Fourth Circuit judgment implicitly adopts the OCC Preemption Opinion analysis without any substantive review. That preemption analysis, however, conflicts with the "prevent or significant interference" preemption test articulated by the *Barnett* Court and the cases on which the *Barnett* Court relied in articulating that test.

Under the OCC's analysis, any state regulation that "unlawfully encroach[es]" on the rights and privileges of national banks; "destroy[s] or hamper[s]" their functions; or "interfere[s] with or impair[s]" their efficiency in exercising their financial subsidiary insurance agency powers in any way—indeed, any state regulation that has more than even a "small effect" on the exercise of such powers—is preempted *See* Pet. App. D at 47a (articulating preemption test); *id.* at 40a. As the three cases on which the *Barnett* Court relied in articulating the significant interference standard—*National Bank v. Commonwealth*, 76 U.S. (9 Wall) 353 (1869); *McClellan v. Chipman*, 164 U.S. 347 (1896); and *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944)—together demonstrate, however, this is not the case—state requirements may not be preempted unless they undermine a national bank's very ability to exercise its powers.

As this Court explained in *National Bank v. Commonwealth*, "[i]t is only when [a] State law *incapacitates* the banks from discharging their duties to the government that [the State law] becomes unconstitutional." 76 U.S. (9 Wall) at 362 (emphasis added).

In *McClellan*, the Court applied this preemption rule to conclude that a Massachusetts statute that limited the conditions under which a bank—including a national bank—could take real estate to secure an antecedent debt was not preempted by the general federal authorization to take real estate to secure antecedent debts. The *McClellan* Court reached this conclusion even though the federal authorization did not condition or restrict that power in any way, because there is "no express conflict between the grant of power by the United States to" national banks and a state law which "provides that [such a power] cannot be [exercised] under particular and exceptional circumstances." 164 U.S. at 358. Indeed, "[n]o function of [national] banks is destroyed or hampered by allowing the banks to exercise [a] power . . . provided only they do so under the same conditions and restrictions to which all the other citizens of the State are subjected[.]" *Id.* The same is true here—there is no "significant interference" with the ability of national banks to exercise their GLBA financial subsidiary insurance sales powers by requiring them to exercise those powers "under the same conditions and restrictions to which all the other citizens of the state are subjected."

Anderson perhaps best demonstrates the difference between permissible state regulation of the manner in which a national bank power is exercised versus impermissible intrusion on the core ability to exercise that power. In reaching the conclusion that a Kentucky escheat law was not preempted, the Court specifically distinguished its earlier decision in *First Nat'l Bank of San Jose v. California*, 262

U.S. 366 (1923), which deemed preempted a seemingly analogous California escheat provision, noting that its:

> [d]ecision [in *San Jose*] turned . . . on the effect of the state statute in altering the contracts of deposit in a manner considered so unusual and so harsh in its application to depositors as to deter them from placing or keeping their funds in national banks.

321 U.S. at 250. In this way, the *Anderson* Court found that the *San Jose* statute "incapacitated" national banks from exercising their deposit-taking powers (because depositors would be deterred from making deposits if the California rule were applied),[20] while the Kentucky statute did not and thus was protected from preemption.[21]

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[20] As the *San Jose* Court noted, "[t]he success of almost all commercial banks depends upon their ability to obtain loans from depositors[.]" *Id.* § 262 U.S. at 370. The California escheat law therefore was preempted because, if it applied, depositors "might well hesitate to subject their funds to possible confiscation" thereby incapacitating such banks from discharging their core duties to the government. *Id.*

[21] Other decisions of this Court decided outside of the banking context confirm that a state law does not "significantly interfere" with the exercise of a federal power unless the state requirement either directly prohibits the exercise of the power or effectively destroys the value of the power. In *Zablocki v. Redhail*, 434 U.S. 374 (1978), for example, the Court found that a state law "significantly interferes" with the exercise of a federal right only where the state law either imposes "direct legal obstacles in the path of persons desiring to" exercise the federal right or "significantly discourage[s], let alone ma[kes] 'practically impossible,'" the exercise of that right. *Zablocki*, 434 U.S. at 387 n.12 (*quoting Califano v. Jobst*, 434 U.S. 47 (1977)); *see also, e.g., Reed v. United Transportation Union*, 488 U.S. 319, 327, 331 (1989) (application of 3-year statute of limitations to federal labor law claim against union does not "significantly interfere" with federal interest in bargaining relationship even though length of time permitted before claim is filed "may sometimes have 'some impact on economic relations between union and employer and on labor peace'"); *Pernell v. Southall Realty*, 416 U.S. 363, 383-84 (1974) (requirements that

Under the language of *Barnett* as incorporated into Section 104(d)(2)(A), the cases on which *Barnett* relied in articulating this standard, and other "significant interference" precedent of this Court, state requirements like the three West Virginia insurance consumer protection provisions at issue here that simply regulate the manner in which the power is exercised but that leave national banks with the ability to exercise that power cannot be said to impermissibly interfere with its exercise. Nor can it be said that they stand as an obstacle to the accomplishment of Congress' GLBA objective—allowing affiliates of national banks to sell insurance *within* the confines of the otherwise applicable state statutory authority—because the West Virginia provisions do not pose a direct legal barrier to the ability to exercise such rights nor do they create an environment in which the ability to exercise such rights essentially is thwarted.[22]

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did "not appear to have posed any unmanageable problems" did not "significantly impair" the state interest in efficient court proceedings).

[22] At bottom, the determination that the state statues at issue here are preempted is based solely on the fact that these statutes prohibit national banks from exercising their financial subsidiary powers in exactly the manner that they want to. But these state regulatory requirements cannot be found to "significantly interfere" with the exercise of a right merely "because some persons who [exercised the right] were burdened thereby." *Califano v. Jobst*, 434 U.S. at 54. Nothing makes this conclusion more clear than *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), in which this Court rejected the Federal Communication Commission's determination that the imposition of additional cost impermissibly "impair[ed]" the ability of common carriers to exercise their federal power to provide services. In concluding that such an interpretation was inconsistent with the plain meaning of the statutory word "impair," the Court concluded that, to have any meaning whatsoever, "impair" must mean something more than just "some increase in cost." *Id.* A telecommunications carrier "whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been 'impaired' in its ability to amass earnings, but has not *ipso facto* been 'impaired . . . in its ability to provided the

Resolution of the conflict between the Fourth Circuit's decision and *Barnett* is vital to the future functioning of the regulatory regime that Congress worked so hard to create. As the decision on review is the first and only post-GLBA case to address the parameters of the Section 104(d)(2)(A) significant interference inquiry, that decision also could have long-lasting precedential effect.

B. The Fourth Circuit Failed To Conduct The Independent Judicial Review Demanded By *Skidmore*

Presumably on the theory that "a court should give some consideration to the interpretation of an ambiguous statutory provision made by the administering agency because of the agency's experience and expertise," Pet. App. A at 7a, the court below concluded that the OCC Preemption Opinion was entitled to receive *Skidmore* deference on review. *Id.* (citing *Skidmore,* 323 U.S. at 140).[23] Through its wholesale adoption of the OCC's Preemption Opinion, however, the court nevertheless contravened this Court's decision in

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services it seeks to offer.'" *Id.* at 390 (*quoting* and construing 47 U.S.C. § 251(d)(2)(B)). The same is true here—the purported imposition of additional costs on the manner in which insurance agency powers are exercised does not undermine the core ability to exercise such powers.

[23] As discussed at length in Argument I, there is a square conflict between the First and Fourth Circuits regarding whether the OCC has *any* "administrative authority" with respect to the Section 104(d)(2) preemption standard. Nor does the OCC possess any specialized expertise warranting the application of *Skidmore* deference. The GLBA empowers the *States* to functionally regulate the insurance activities of everyone—including national banks and their financial subsidiaries—precisely because it is the States that have the requisite experience with respect to the regulation of insurance activities. *See supra* at 9-11 (discussing same). Moreover, and as discussed at length below, the preemptive effect of a statute generally is a legal question for which Skidmore *deference* is not appropriate in any event.

Skidmore and its progeny by failing to conduct its own independent analysis.

Skidmore described the deference to which interpretive rulings such as the OCC letter opinion at issue may be entitled as follows:

> We consider that the . . . interpretations . . . of the Administrator . . ., while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140; *see also United States v. Mead*, 533 U.S. 218, 234-35 (2001) (reiterating the *Skidmore* test).

Before it can judge the ultimate "persuasiveness" of an agency interpretation under *Skidmore*, a "court must assess [that] interpretation against multiple factors and determine what weight they should be given." Thomas W. Merrill and Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L. J. 833, 855 (2001); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 228 (2nd Cir. 2002) (*Skidmore* compels a "more nuanced, context sensitive rubric" whereby courts conduct analysis of persuasiveness factors) (citing *id.* at 836, 855). Indeed, "[t]he simple fact that the agency *has* a position, in and of itself, is of only marginal significance." *Mayburg v. Sec'y of HHS*, 740 F.2d 100, 106 (1st Cir. 1984) (Breyer, J.) (emphasis in original).

The question here, moreover, requires interpretation and application of an express preemption standard that is both codified in GLBA § 104(d)(2)(A) and expressly dependent on *Barnett*. The meaning and scope of that standard and the interpretation of the cases on which it is based are questions

of law that the federal *courts,* not the agencies, are best equipped to decide. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987); *Mayburg*, 740 F.2d at 107 (interpretive skills necessary to determine meaning of central statutory provision are "primarily judicial, not administrative, in nature"). Because the "judiciary is the final authority on issue of statutory construction and must reject administrative constructions which are contrary to clear congressional intent," a court should defer to an agency interpretation of a statute only after employing traditional tools of statutory construction. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). *See also United Techs. Corp. v. U.S.*, 315 F.3d 1320, 1322 (Fed. Cir. 2003) (despite *Skidmore*'s deference mandate, a court must continue to "recogniz[e] its independent responsibility to decide the legal issue regarding the proper meaning and scope of the [statute's] terms") (citation omitted).

Rather than apply traditional tools of statutory construction to the interpretation of the statutory provision at issue, the Fourth Circuit relied solely on the OCC's having done so for it. The court conducted no analysis whatsoever of the parameters of the Section 104(d)(2)(A) preemption standard or of the structure of the GLBA, its legislative history, or its purpose. Perhaps most significantly, the court did not once mention *Barnett* or the exacting preemption test *Barnett* established, despite the unique *codification* of the pertinent holding from that case in the GLBA. Instead, the court simply deemed the OCC's consideration of these issues "thorough" because the opinion underwent notice and comment, and "valid" because—circularly—the OCC's conclusions were "reasonable." Pet. App. A at 8a. With no other legal assessment or discussion of any evidence regarding bank sales of insurance, the court thus agreed with the OCC that the state laws at issue are preempted. *Id.* at 9a.

By deferring in this manner, the court did nothing more than rubberstamp the OCC's conclusions and, in so doing, abdicated its own judicial responsibility under *Skidmore*. *Compare U.S. Freightways Corp. v. Commissioner*, 270 F.3d 1137, 1142-1146 (7th Cir. 2001) (court did not defer to agency opinion until after conducting own independent analysis of *Skidmore* factors); *Omohundro v. U.S.*, 300 F.3d 1065, 1067-1069 (9th Cir. 2001) (same); *Hall v. U.S. Envtl. Prot. Agency,* 273 F.3d 1146, 1156 (9th Cir. 2001) (denying *Skidmore* deference to agency interpretation for failure to demonstrate persuasiveness factors); *Landmark Legal Found. v. IRS*, 267 F.3d 1132, 1135-1138 (D.C. Cir. 2001) (court did not defer until after conducting own analysis of *Skidmore* factors); *Heartland By-Products, Inc. v. U.S.*, 264 F.3d 1126, 1134-1136 (Fed. Cir. 2001) (same).[24]

At some level, the Fourth Circuit's confusion with respect to the application of *Skidmore* deference may have been foreseeable because *Skidmore* sets forth a sliding scale of deference owed to an agency interpretation of a statute that is dependent on amorphous and difficult-to-apply factors. *See, e.g., Mead,* 533 U.S. at 245-50 (Scalia, J., dissenting). Particularly salient here is Justice Scalia's observation that, in an era when administration of federal statutory law by federal agencies is pervasive and statutory ambiguities abound:

> totality-of-the-circumstances *Skidmore* deference is a recipe for uncertainty, unpredictability, and endless litigation.

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[24] Even under the heightened deference afforded to agency interpretations under *Chevron,* this Court has recognized that "deference is not abdication, and it requires [the court] to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (1991); *cf. Miller-El v. Cockrell*, __ U.S. __, 123 S. Ct. 1029, 1041 (2003) (in federal habeas case, noting that "deference does not imply abandonment or abdication of judicial review").

Id. at 250; *see also Christensen v. Harris County,* 529 U.S. 576, 589 n.* (2000) (Scalia, J., concurring). Given the Fourth Circuit's *Skidmore* analysis, further guidance from this Court on the appropriate parameters of the *Skidmore* inquiry may be needed.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully urge this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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May 2, 2003

APPENDICES

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-2100

JANE L. CLINE, in her capacity as Insurance Commissioner of the State of West Virginia; STATE OF WEST VIRGINIA,
Petitioners,

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INCORPORATED; NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INCORPORATED,
Intervenors,

versus

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States of America; THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, as an agency of the United States of America,
Respondents.

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS,
Amicus Supporting Petitioner,

AMERICAN BANKERS ASSOCIATION; AMERICAN BANKERS INSURANCE ASSOCIATION AND WEST VIRGINIA BANKERS ASSOCIATION;
Amici Supporting Respondents.

On Petition for Review from the Comptroller of the United States, Department of Treasury.

Argued: October 30, 2002 Decided: November 19, 2002

Before LUTTIG, KING, and GREGORY, *Circuit Judges*.

GREGORY, *Circuit Judge*:

Jane Cline, Insurance Commissioner of the State of West Virginia, and the State of West Virginia (collectively referred to as "Petitioners") brought suit against John Hawke, Comptroller of the Currency of the United States of America, pursuant to the Gramm-Leach-Bliley Act of 1999 ("GLBA").[1] Petitioners seek review of a preemption letter issued by the Office of the Comptroller of the Currency ("OCC") regarding insurance laws of the State of West Virginia. In the preemption letter, the OCC opined that federal law preempted four provisions and a portion of a fifth provision of the West Virginia Insurance Sales Consumer Protection Act, an act regulating the sale of insurance by banks and other financial institutions. Petitioners' suit challenges the authority of the OCC to issue such a preemption letter. For the following reasons, we dismiss the petition for review.

I.

Lawyers for the West Virginia Bankers Association[2] sent a letter to the Chief Counsel of the OCC on May 8, 2000, requesting the preemption of ten provisions of the West Virginia Insurance Sales Consumer Protection Act. *See* Letter from Sandra Murphy, Attorney, Bowles, Rice, McDavid, Graff & Love, to Julie Williams, Chief Counsel, Office of the Comptroller of the Currency, 1 (May 8, 2000)

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[1] The relevant provisions of the GLBA, Sections 104 and 304, are codified at 15 U.S.C. §§ 6701 and 6714, respectively. In this opinion, we cite Sections 104 and 304 of the GLBA, rather than to the provisions as codified.

[2] The West Virginia Bankers Association is a banking trade association consisting of community banks, regional banks, and savings and loans located in West Virginia.

(J.A. 2-12)[3]. The OCC published notice of the request in the *Federal Register* on June 2, 2000, and sought comments as to whether federal law preempted the West Virginia statutory provisions. The OCC received sixty-seven comments in response to the published notice, including a response from Hanley Clark, former Insurance Commissioner for West Virginia. In a letter dated September 24, 2001, the OCC issued its opinion regarding the preemption of the West Virginia statutory provisions ("Preemption Letter"). The OCC concluded that four of the West Virginia statutory provisions, as well as a portion of a fifth provision, were preempted by federal law. Petitioners filed a petition for review of the Preemption Letter with this Court on September 20, 2002.

II.

This Court has jurisdiction over this case pursuant to Section 304 of the GLBA. Under that section, where there is a regulatory conflict between a State insurance regulator and a Federal regulator, including the preemption of a State law, the Federal or State regulator "may seek expedited judicial review of such determination by the United States Court of Appeals for the circuit in which the State is located . . . ." Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 304(a) (1999). We must decide the petition based on a "review on the merits of all questions presented under State and Federal law, including the nature of the product or activity and the history and purpose of its regulation under State and Federal law, without unequal deference." § 304(e) (1999).

The dissent argues that there is no Article III standing in this case. With all due respect to Judge King, we disagree. In enacting the GLBA, Congress gave this Court original jurisdiction where there is a regulatory conflict between a State

[3] The Joint Appendix is cited as J.A. in this opinion.

insurance regulator and a Federal regulator regarding insurance issues, including preemption issues. *See* § 304(a) (1999). The language of the GLBA, therefore, gives this Court jurisdiction over controversies in which a State regulator conflicts with the Federal regulator regarding the regulation of insurance issues. This grant of jurisdiction is, however, subject to Article III standing limitations.

To have Article III standing, a litigant must show that: "1) it has suffered an 'injury in fact' that is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000). In the instant case, the Preemption Letter causes banks to change their business plans and business practices and therefore conflict with the West Virginia laws. West Virginia therefore suffers because it cannot enforce certain provisions of its insurance laws against national banks. To undermine the sovereign's authority to regulate activity for the protection of its citizens constitutes injury in fact. Thus, the first prong of the test for Article III standing is met.

It is clear that the injury is traceable to the OCC's action, which is challenged in this case, thus satisfying the second prong of the test for Article III standing. Finally, if this Court were to rule in the Petitioners' favor, West Virginia's grievance would be redressed, because the state would be able to compel national banks to comply with its insurance laws. Accordingly, we find that Article III standing exists in this case.

III.

There are three issues before this Court. First, we must address whether the OCC has authority to interpret the GLBA. Second, if the OCC does have interpretive authority,

we must determine what deference should be given to the OCC. Finally, we must determine whether the preemption of West Virginia law was a proper exercise of the OCC's interpretive authority.

A.

Petitioners argue that an agency is without power to preempt state law unless Congress specifically delegates authority to an agency.[4] *See* Petitioners' Br. at 30. They are correct in their assertion that the GLBA does not give the OCC express power of interpretation. However, an administrative agency's authority need not be expressly delegated by Congress. "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit." *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2782 (1984).

It is clear from the language of the GLBA that Congress contemplated that the OCC would interpret some provisions of the GLBA. Section 104(d)(2)(C)(1) is titled "OCC Deference" and applies to state statutes enacted before September 3, 1998. Had Congress not anticipated OCC action interpreting the GLBA, there would be no need for an "OCC Deference" provision of the GLBA. Therefore, we find that the OCC has implicit interpretive authority under the GLBA. Accordingly, we turn now to determine the scope of that authority.

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[4] Petitioners also argue that Congress intended that states would remain the functional regulators of insurance and that state insurance regulations could only be negated by a federal agency in extremely limited circumstances. *See* Petitioners' Br. at 32. However, the preservation of state authority under GLBA is subject to the provisions of § 104, where the preemption statute is found. *See* Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, § 301 (1999). Therefore, state authority that prevents or significantly interferes with a depository institution's ability to engage in insurance sales, solicitation, or crossmarketing is still preempted under the GLBA.

We look to statutes and other authorities related to the GLBA to determine the scope of the OCC's implicit interpretive authority under the GLBA. The GLBA addresses the ability of national banks to engage in insurance sales, solicitation and crossmarketing. Similarly, the National Bank Act ("NBA"), 12 U.S.C. § 1 *et seq.*, addresses the ability of national banks to engage in insurance sales in small towns. Under § 92 of the NBA, the OCC has explicit authority to regulate the sale of insurance by national banks located in small towns. *See* 12 U.S.C.A. § 92 (2001). The GLBA, in essence, expands the scope of § 92 to permit national banks to engage in insurance sales nationwide. Therefore, because Congress previously granted explicit interpretive authority to the OCC in § 92 of the NBA and the GLBA is an expansion of § 92, we find that the OCC must have implicit interpretive authority under the GLBA.

B.

We turn now to examine whether the OCC is entitled to deference in this case. The GLBA instructs this Court to decide petitions filed under Section 304 "without unequal deference" to its review of all questions presented under State and Federal law. *See* § 304(e) (1999). However, where a statute was issued, adopted or enacted before September 3, 1998, deference should be given to the OCC. *See* § 104(d)(2)(C)(i) (1999) ("OCC Deference: Section 304(e) does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued, adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B)." (emphasis added)). The West Virginia Insurance Sales Consumer Protection Act was enacted in 1997. Additionally, the statutes at issue in the instant case do not fall within

the categories of preserved state laws enumerated under § 104(d)(2)(B). Therefore, in accordance with § 104(d)(2)(C)(i) of the GLBA, we give deference to the OCC.

Although the OCC is entitled to some deference, the GLBA does not provide guidance as to what level of deference is appropriate.[5] The OCC argues that the deference enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161 (1944), should be applied in the instant case. Under *Skidmore*, a court should give some consideration to the interpretation of an ambiguous statutory provision made by the administering agency because of the agency's experience and expertise. *See* 323 U.S. at 140. The Supreme Court held in *Christenson v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000), that agency "interpretations contained in formats such as opinion letters are 'entitled to respect'" under *Skidmore*, "but only to the extent that those interpretations have the 'power to persuade.'" *Christenson*, 529 U.S. at 587 (citations omitted). Therefore, we hold that *Skidmore* deference applies to this case.

C.

We now must review the Preemption Letter to see if it meets the standard for persuasiveness under *Skidmore*. *See Skidmore* at 140. In reviewing persuasiveness, we must consider the thoroughness of the OCC's consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. *Id.*

Section 6 of the West Virginia Act prohibits financial employees with lending responsibilities from soliciting the

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[5] The briefs submitted to this Court by the Petitioners and Intervenors argue that deference should not be given to the OCC under the *Chevron* standard. During oral argument, however, the OCC stated that it was not arguing for *Chevron* deference because its regulation writing authority does not come from the GLBA; rather, its authority to write regulations originates in the National Banking Act.

sale of insurance. Section 9(a) requires disclosures to be made in writing, "including in connection with advertisements and promotional material, and orally 'during any customer contact.'" Section 10(a) prohibits financial institutions from making an insurance-related referral or solicitation of a loan customer until after the bank has approved the loan or credit. Section 13 requires a customer's separate written consent to the bank's disclosure of insurance information to an agent or broker affiliated with the bank no less than two days after the time of application for, approval of and making of the loan or extension of credit. Finally, Section 14 requires banks to sell insurance products in an area separate and distinct from the institution's lending and deposit-taking activities.

The OCC found that these provisions of the West Virginia Act were preempted by federal law. *See* Preemption Letter at 2. In reaching its result, the OCC relied on public comments received during the formal notice-and-comment procedure. *Id.* at 2. Additionally, the OCC "relied on the written comment submitted by the Insurance Commissioner for the State of West Virginia and on discussions with the staff of the West Virginia Insurance Department" to clarify how particular provisions of the West Virginia Act would be administered or applied. *Id.* Because the OCC implemented a formal notice-and-comment procedure and consulted the West Virginia Insurance Department and the Insurance Commissioner of West Virginia in reaching its decision, we find that the OCC's consideration was thorough.

We turn now to review the validity of the OCC's reasoning. In making its findings, the OCC reasoned that the West Virginia provisions at issue are disruptive to bank operations, increase bank operating costs, and substantively affect a bank's ability to solicit and sell insurance products. *See* Preemption Letter at 16-31 (J.A. 73-88). These effects prevent or significantly interfere with a bank's ability to

engage in insurance sales, solicitation, or crossmarketing activity. Additionally, the OCC found that the requirements under Section 13 violate the Fair Credit Reporting Act, which prohibits States laws that imposement requirements or prohibitions regarding "the exchange of information among persons affiliated by common ownership or common corporate control." 15 U.S.C.A. § 1681t(b)(2) (1998). Because we find that the OCC's reasoning to be valid, we hold that the Preemption Letter meets the standard for persuasiveness under *Skidmore*.

IV.

Because we hold that the OCC had authority to interpret the GLBA and that its decision met the standard for persuasiveness under *Skidmore*, we dismiss the petition for review.

DISMISSED

LUTTIG, *Circuit Judge*, concurring in the judgment.

I agree with the judgment reached by the court that this action should be dismissed. I also agree, for the reasons stated in the OCC opinion letter and those articulated by counsel for the OCC during oral argument, that the West Virginia provisions at issue are preempted under federal law.

KING, *Circuit Judge*, dissenting:

The majority today addresses complex issues regarding the possible preemptive effect of the Gramm-Leach-Bliley Act (the "GLBA") on state regulation of the insurance industry. To reach these issues, the majority [6] reviews an advisory opinion of the Office of the Comptroller of the Currency (the "OCC"), which suggests that GLBA preempts certain provisions of West Virginia law. In reviewing a non-binding OCC opinion, however, my good colleagues run afoul of the case or controversy mandate of Article III of the Constitution.[7] Because we lack jurisdiction to render a decision under these circumstances, I respectfully dissent.

I.

On May 8, 2000, the West Virginia Bankers Association (the "WVBA") sought an opinion from the OCC that GLBA

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[6] In referring to "the majority," I mean the majority's *judgment* that dismisses the Commissioner's petition for review on the basis that federal law preempts aspects of the West Virginia Code. I realize that there is no majority opinion here.

[7] Pursuant to Article III of the Constitution of the United States, the power of our judiciary extends:

> to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States, . . . [and] to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

preempts certain West Virginia statutes. More precisely, the WVBA asked the OCC to "preempt ten (10) provisions of the West Virginia Insurance Sales Consumer Protection Act." Comm'r Pet. Ex. A. Although WVBA's letter implied that the OCC could itself preempt state law, it effectively requested the OCC to issue an opinion declaring that federal law preempts ten provisions of the West Virginia Code.[8]

On June 2, 2000, the OCC published notice of the WVBA letter in the *Federal Register* and requested comments on the preemption issue. After considering the WVBA request and reviewing comments, the OCC issued an opinion (the "Preemption Opinion") on September 24, 2001, suggesting that several provisions of West Virginia law are preempted. Even though the Preemption Opinion was preceded by formal notice and comment, the OCC acknowledges that it "does not purport to be a regulation, an adjudication, or a licensing procedure carrying the force of law." OCC Br. at 21. In fact, in this very proceeding, the OCC criticizes the Commissioner for failing to acknowledge that the Preemption Opinion is "a legal *opinion*," *id.* at 19 (emphasis in original), and represents only "informal agency guidance." *Id.* at 21.

As the OCC recognizes, it is not authorized to render a binding preemption decision. *Id.* at 22. The OCC is an agency in the Department of the Treasury, charged with the administration of the National Bank Act. *See* 12 U.S.C. § 1. It has authority over the chartering, supervision, and regulation of national banks, including the right to determine the nature and scope of statutorily authorized banking powers. *See* 12 U.S.C. § 24(Seventh). In addition, the Comptroller is entitled to promulgate regulations to implement 12 U.S.C. § 92, a statute enabling national banks to sell insurance in

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[8] The contested provisions of the West Virginia Code are contained within sections 6, 8-11, 13, and 14 of Article 11A of Chapter 33.

small towns, and the Comptroller possesses limited authority to "prescribe rules and regulations to carry out the responsibilities of the office." 12 U.S.C. § 93a.

The OCC has no authority, however, to act unilaterally in interpreting or implementing GLBA. To the extent that the OCC possesses any power under GLBA, it shares that power with other federal banking agencies. *See* GLBA, § 305 (codified at 12 U.S.C. § 1831x). Notwithstanding the position of my good friend Judge Gregory, *ante* at 8, GLBA was not designed to expand the power of national banks to issue insurance, but rather its purpose was to remove the traditional barriers among the banking, insurance, and securities Industries. Therefore, the OCC does not possess, nor does it claim, a role in implementing GLBA. Because the OCC is not charged with enforcing or implementing GLBA, its opinions on GLBA's preemptive effect are not entitled to *Chevron*-type deference.[9] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984).[10] Indeed, it

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[9] If the Preemption Opinion had purported to interpret the incidental powers of national banks pursuant to the National Bank Act, we would be presented with an entirely different case. Had the OCC issued this type of opinion, it would be entitled to *Chevron* deference, and (more importantly for our purposes) we would have jurisdiction to review it. *See Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57 (1995) (conducting *Chevron* analysis for an OCC interpretation of incidental powers of national banks under 12 U.S.C. § 24(Seventh)); *Indep. Ins. Agents of Am., Inc. v. Hawke*, 211 F.3d 638, 643 (D.C. Cir. 2000) (same); *Sec. Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1037-38 (2d Cir. 1989) (addressing OCC opinion approving national bank practice). In this situation, however, the OCC issued a wide- ranging opinion on the general preemptive effect of GLBA. As the OCC properly recognizes, its Preemption Opinion is not entitled to *Chevron*-type deference and, as it should have recognized, we have no jurisdiction to review such an opinion.

[10] Even if the OCC was the agency in charge of enforcing GLBA, informal agency opinions are not generally entitled to *Chevron* deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations

is doubtful that an agency's opinion on the preemptive effect of federal law should ever be accorded deference since, as the OCC recognizes, "preemption issues are ultimately a matter to be decided by federal courts." OCC Br. at 22. Therefore, the Preemption Opinion merely represents an advisory opinion of the OCC on an issue outside of its statutory powers.

II.

Although it concedes that the Preemption Opinion lacks the force of law, the OCC nevertheless insists that we should render a decision in this proceeding because its disagreement with the Commissioner presents a justiciable case or controversy within the meaning of Article III. *Id.* at 23 n.5. According to the OCC, its legal opinions influence the business decisions of national banks, and the Preemption Opinion may indirectly impair the Commissioner's ability to enforce state law. OCC Supp. Br. at 4, 6. As another court has suggested, the OCC opinions may have the practical effect of "permitting and encouraging national banks" to disobey otherwise enforceable laws. *Sec. Indus. Ass'n v. Clarke*, 885 F.2d 1034, 1039 (2d Cir. 1989).

Despite the possible real-world effects of the Preemption Opinion, the Commissioner's petition for review fails to present a justiciable case or controversy.[11] Since the Preemption Opinion is purely advisory, it does not interfere with the Commissioner's ability to enforce West Virginia law. To

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such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.").

[11] The First Circuit—in a dispute between a state regulator and the OCC over GLBA's preemptive effect—has also recently raised the concern that federal courts lack Article III jurisdiction in this regard. *See Bowler v. Hawke*, No. 02-1738 (1st Cir. argued August 2, 2002). While the First Circuit has ordered supplemental briefing on the Article III issue, it has yet to render a decision on the matter.

the extent that a bank might rely on the Preemption Opinion in violating state law, it would do so at its own risk. Because the Preemption Opinion has no legal effect, the petition for review simply asks us to decide whether federal law might, in some future case, provide a defense to a bank's noncompliance with state law. Such a hypothetical scenario fails to present a justiciable question. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (finding no Article III jurisdiction to issue "an advance ruling on an affirmative defense"); *Miller v. FCC*, 66 F.3d 1140, 1145 (11th Cir. 1995) ("By asking this court to decide what another court should do in a future case, petitioners are posing a hypothetical question, the answer to which would be an advisory opinion.").

A.

Under Article III, the judicial power of the federal courts is limited "to 'the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). This "bedrock requirement" ensures that Article III power "is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Id.; see also Raines v. Byrd*, 521 U.S. 811, 818 (1997). Indeed, the judicial power "'is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian Coll.*, 454 U.S. at 471 (quoting *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892)). As part of this case or controversy requirement, federal courts are simply not entitled to issue advisory opinions on hypothetical questions.

Presented with facts nearly identical to those here, the Eleventh Circuit, in *Miller v. FCC*, concluded that the constitutional prohibition on advisory opinions precluded its review of a non-binding agency opinion. 66 F.3d at 1141-42. In that situation, candidates for public office in Georgia had challenged the FCC's authority to issue a ruling on whether

federal law preempted state law causes of action. *Id.* The FCC's ruling only represented its opinion on the preemptive effect of federal law, and it thus did not carry the force of law. *Id.* at 1144. Because the FCC's opinion had no binding effect, the court of appeals concluded that the petition for review presented an abstract, hypothetical question rather than a justiciable case or controversy. *Id.* at 1145-46; *see also id.* at 1146 ("[W]e are prohibited from determining the propriety of the FCC's declaratory ruling given the abstract circumstances in which this issue is presented.").

Similarly, in *New York Stock Exchange, Inc. v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977), the Court of Appeals for the District of Columbia held that a non-binding OCC opinion was not ripe for judicial review as required by Article III. *Id.* at 736-37, 41. In that case, a bank requested an OCC opinion on whether a proposed banking service would violate the Glass-Steagall Act (the "GSA"), the pre-GLBA statute that had prohibited banks from engaging in insurance practices. *Id.* at 737. The OCC responded to this request with an opinion letter concluding that the proposed service was consistent with the GSA. *Id.* at 739. The New York Stock Exchange (the "NYSE") then sued the OCC under the Administrative Procedures Act, challenging the OCC opinion. In response, the OCC insisted that the NYSE's claim was not ripe for review because the opinion letter did not carry the force of law.

The court of appeals agreed with the OCC, ruling that the NYSE's challenge to the OCC opinion was not ripe for review. The court evaluated the ripeness issue under the two-part inquiry of *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), analyzing (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding judicial review. In applying the first prong of *Abbott Laboratories*, the court noted "that appellants are challenging informal opinion letters rather than formal rules or policy

statements." *New York Stock Exch.*, 562 F.2d at 741. The court also pointed out that undeveloped facts would be relevant to deciding the merits of the NYSE's challenge, so it concluded that judicial review of the OCC opinion would be premature. *Id.* Addressing the potential hardship to the parties of withholding such review, the court of appeals emphasized that "appellants' conduct [was] not directly regulated by the agency action at issue and consequently they are not facing a 'Hobson's choice' between burdensome compliance and risky noncompliance." *Id.* Accordingly, it concluded that the NYSE's challenge to the OCC opinion failed to pass Article III muster. *Id.* at 743.

B.

The constitutional prohibition on advisory opinions, embodied in Article III and its jurisprudence, bars the exercise of jurisdiction here. The Commissioner's petition for review presents nothing more than an abstract disagreement between state and federal regulators. *See Abbott Labs.*, 387 U.S. at 148 (noting that ripeness doctrine is designed to "prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements"). The Preemption Opinion simply does not represent the type of final agency action that would be subject to judicial review.[12] *Compare NationsBank of N.C., N.A. v. Variable Annuity Life*

[12] Ordinarily, Congress does not purport to give federal courts jurisdiction over provisional or preliminary agency actions. *See* 5 U.S.C. § 704 (requiring final agency action for judicial review under Administrative Procedures Act); *see also Allied Corp. v. United States Int'l Trade Comm'n*, 850 F.2d 1573, 1578 (Fed. Cir. 1988) ("That an agency may choose to render advisory opinions cannot create for one displeased with its advice a cause of action cognizable in an Article III court."). In this situation, however, the Article III issue is squarely presented because GLBA attempts to give federal courts jurisdiction to adjudicate disputes between state and federal regulators, no matter how abstract such a dispute may be. *See* GLBA, § 304(a) (codified at 15 U.S.C. § 6714(a)).

Ins. Co., 513 U.S. 251, 256-57 (1995) (reviewing final OCC opinion issued pursuant to 12 U.S.C. § 24(Seventh)); *Bank of Am. v. San Francisco*, 309 F.3d 551 (9th Cir. 2002) (same); *see also Florida v. Weinberger*, 492 F.2d 488, 492 (5th Cir. 1974) (finding jurisdiction to review agency regulation that "is final and is formally and actually in effect").

Under the *Abbott Laboratories* test, the question of GLBA's preemptive effect on West Virginia law is not ripe for judicial review. First, the preemption issues are not fit for our consideration. *See* 387 U.S. at 149. In order to address the issue of preemption, the majority must make assumptions about undeveloped factual issues that are material to its decision. For example, the question of whether West Virginia law will interfere with the ability of banks to enter the insurance market involves factual issues about insurance and banking practices. Because no bank has been joined as a party in this proceeding, the majority is forced to rely on the OCC to understand the banking and insurance industries in West Virginia. *Ante* at 11. The OCC, however, is an imperfect surrogate for the banking and insurance industries. To ensure a full development of the relevant facts, the scope of GLBA's preemption should initially be addressed in an enforcement proceeding initiated by a state regulator, or in a declaratory judgment action instituted by a bank.[13]

Second, judicial review is not necessary at this juncture to protect the parties from any undue hardship. *See Abbott Labs.*, 387 U.S. at 151-53. The parties have alternate avenues

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[13] Where the OCC has authorized national banks to engage in practices that violate state or municipal laws, national banks typically initiate declaratory judgment proceedings against state or local regulators. *See generally Bank of Am. v. San Francisco*, 309 F.3d 551 (9th Cir. 2002) (bank sued local regulator); *Wells Fargo Bank Texas, N.A. v. James*, 184 F. Supp. 2d 588 (W.D. Tex. 2001) (bank sued state regulator); *Metrobank Nat'l Ass'n v. Foster*, 178 F. Supp. 2d 987 (S.D. Iowa 2001) (banks sued state regulator).

available through which to seek judicial review of the preemption issues. If the petition for review is dismissed for want of jurisdiction, the Commissioner may then institute an enforcement action against non- complying banks, or banks may institute declaratory judgment proceedings against the Commissioner. *See Indep. Broker-Dealers' Trade Ass'n v. SEC*, 442 F.2d 132, 140 (D.C. Cir. 1971) (reviewing informal agency action because party had no other recourse to obtain relief). Further, the Preemption Opinion does not place regulated entities into the position of making a "Hobson's Choice" between burdensome compliance or risky noncompliance. *See Abbott Labs.*, 387 U.S. at 152-53; *Nat'l Automatic Laundry Cleaning Council v. Shultz*, 443 F.2d 689, 696-97 (D.C. Cir. 1971) ("*NALCC*"). Because the Preemption Opinion has no legal effect, the parties face no undue hardship in waiting for judicial review.

C.

Significantly, the petition does not request review of a coercive (even if technically non-binding) agency opinion.[14] In limited circumstances, an "agency action may be reviewable even though it is never to have a formal, legal effect" because it will have "an immediate and practical impact" on

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[14] The label attached by an agency to its action is not determinative of the action's finality. *See CBS v. United States*, 316 U.S. 407 (1942). An agency action may, in fact, be final even though the agency characterizes it as tentative, preliminary, or provisional. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) (reviewing agency "guidance" because it was effectively the agency's final position). To decide whether an agency action is reviewable, courts take a pragmatic approach to the requisite finality and look to whether the agency action has "contemplation of expected conformity." *Indep. Broker-Dealers' Trade Ass'n*, 442 F.2d at 141; *see also NALCC*, 443 F.2d at 697. In this situation, unlike in *CBS* and its progeny, the Preemption Opinion cannot be considered a final, reviewable action because it deals with a matter outside the OCC's bailiwick. Therefore, the OCC cannot reasonably expect conformity with its position.

regulated entities. *Cont'l Airlines, Inc. v. Civil Aeronautics Bd.*, 522 F.2d 107, 124 (D.C. Cir. 1975) (en banc). For example, in *Independent Broker- Dealers' Trade Association*, the Second Circuit reviewed an SEC letter asking the NYSE to ban a controversial brokering practice. 442 F.2d at 139-40. The SEC could have issued binding regulations, but the NYSE changed its rules voluntarily. *Id.* Even though the SEC letter was merely suggestive, the court reviewed a trade association's challenge, concluding that the letter had a sufficiently coercive effect to justify judicial review. *Id.* at 145.

In the circumstances presented here, however, the Preemption Opinion is not sufficiently coercive to justify judicial review. It does not carry the force of law, it does not impose affirmative obligations, and it does not threaten consequences for noncompliance. Put simply, the Preemption Opinion is not reviewable because the OCC acted outside its regulatory authority. *Compare Appalachian Power Co. v. EPA*, 208 F.3d 105, 1021 (D.C. Cir. 2000) (reviewing agency "guidance" on interpretation of its regulations); *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 407 (D.C. Cir. 1997) (reviewing agency opinion on interpretation of agency's organic statute). Even if, as a practical matter, national banks *will* rely on the Preemption Opinion, such reliance would result from a mistaken legal conclusion regarding the OCC's authority, and it does not create Article III jurisdiction.

III.

Because the majority has reached beyond our jurisdiction in rendering this decision, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed February 21, 2003]

No. 02-2100

JANE L. CLINE, in her capacity as Insurance Commissioner of the State of West Virginia; STATE OF WEST VIRGINIA;
Petitioners,

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INCORPORATED; NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INCORPORATED,
Intervenors,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States of America; THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, as an agency of the United States of America,
Respondents,

NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS;
Amicus Supporting Petitoner,

AMERICAN BANKERS ASSOCIATION; AMERICAN BANKERS INSURANCE ASSOCIATION AND WEST VIRGINIA BANKERS ASSOCIATION;
Amicus Supporting Respondents.

Corrected Order
On Petition for Rehearing and Rehearing In Banc

The Intervenors filed a petition for rehearing and rehearing en banc.

Judge King voted to grant panel rehearing. Judge Luttig and Judge Gregory voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Gregory for the Court.

For the Court,

/s/ Patricia S. Connor
PATRICIA S. CONNOR
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-1738

JULIANNE M. BOWLER, in her capacity as Commissioner of Insurance of the Commonwealth of Massachusetts; THOMAS J. CURRY, in his capacity as Commissioner of Banks of the Commonwealth of Massachusetts; COMMONWEALTH OF MASSACHUSETTS,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States; THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an Agency of THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF DETERMINATION
BY COMPTROLLER OF THE CURRENCY
OF THE UNITED STATES

February 13, 2003, Decided

JUDGES: Before TORRUELLA, *Circuit Judge*, JOHN R. GIBSON,* *Senior Circuit Judge*, and HOWARD, *Circuit Judge*.

OPINION

HOWARD, Circuit Judge. The Commonwealth of Massachusetts and its Commissioners of Insurance and Banks (collectively, "Massachusetts") have filed a petition asking that we "vacate, set aside, or otherwise annul" an opinion of

the Office of the Comptrolier of the Currency ("OCC"). Massachusetts objects to the OCC's determination that the Gramm-Leach-Bliley Act of 1999 ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (1999), preempts three provisions of a Massachusetts consumer protection statute and their corresponding regulations. In filing the petition with this Court, Massachusetts relies on GLBA § 304(a), 15 U.S.C. § 6714(a), which provides:

> In the case of a regulatory conflict between a State insurance regulator and a Federal regulator regarding insurance issues, including whether a State law, rule, regulation, order, or interpretation regarding any insurance sales or solicitation activity is properly treated as preempted under Federal law, the Federal or State regulator may seek expedited judicial review of such determination by the United States Court of Appeals for the circuit in which the State is located or in the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in such court.

Because the OCC's determination was set forth in an informal opinion letter which does not appear to carry the force of law, presage imminent coercive conduct, or seemingly otherwise bind Massachusetts, we became concerned that the petition seeks an advisory opinion and thus fails to describe a "regulatory conflict" amounting to a case or controversy. Accordingly, we solicited supplemental briefs addressing our subject matter jurisdiction. *See, e.g., Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02, 72 L. Ed. 2d 492, 102 S. Ct. 2099 (1982) (recognizing that the federal judicial power conferred by U.S. Const. art. III, § 2, cl. 1, extends only to cases and controversies and that a court must on its own motion raise the issue if doubtful about its power to adjudicate a matter). Having considered the parties' submissions, we conclude that the OCC opinion letter does not create a justiciable

"regulatory conflict" within the meaning of the GLBA. We therefore dismiss the petition.

The facts relevant to our jurisdictional analysis are undisputed. The GLBA, which became effective in 1999, amended several federal statutes that govern financial institutions. Among its many goals, the GLBA sought to facilitate affiliations between banks and insurance companies and to permit depository institutions and their affiliates to offer insurance products. *See generally*, Pub. L. No. 106-102, 113 Stat. 1338, tit. I (codified in scattered sections of 12 and 15 U.S.C.). Because the states have historically regulated the insurance industry, see, e.g., the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1101 (recognizing this practice and declaring it to be in the public interest), the GLBA includes a number of provisions specifying whether and how much it preempts otherwise applicable state insurance laws.

Of particular concern for present purposes is GLBA § 104(d)(2), 15 U.S.C. § 6701(d)(2), which addresses the extent to which the states may continue to regulate the insurance sales, solicitation, and cross-marketing activities of depository institutions and their affiliates. GLBA § 104(d)(2)(A), 15 U.S.C. § 6701(d)(2)(A), sets forth a general preemption provision. The provision reads:

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25, 134 L. Ed. 2d 237, 116 S. Ct. 1103 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

GLBA § 104(d)(2)(B), 15 U.S.C. § 6701(d)(2)(B), refines the scope of subparagraph (A)'s general preemption provision

by stating that state laws regulating the sales, solicitation, and cross-marketing activities of depository institutions and their affiliates are not preempted under subparagraph (A) so long as they "are substantially the same as but no more burdensome or restrictive than" thirteen statutory categories described in subsequent clauses. GLBA § 104(d)(2)(C)(iii), 15 U.S.C. § 6701(d)(2)(C)(iii), provides this additional interpretive gloss:

> Nothing in this paragraph shall be construed—
>
> (I) to limit the applicability of the decision of the Supreme Court in *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25, 134 L. Ed. 2d 237, 116 S. Ct. 1103 (1996) with respect to any State statute, regulation, order, interpretation, or other action that is not referred to or described in subparagraph (B); or
>
> (II) to create any inference with respect to any State statute, regulation, order interpretation, or other action that is not described in this paragraph.

On May 30, 2000, the Massachusetts Bankers Association, a trade association, requested the OCC's opinion whether GLBA § 104(d)(2) preempts three provisions of a Massachusetts statute entitled "An Act Providing Consumer Protection Relative to the Sale of Insurance by Banks." That state law regulates the sales, solicitation, and cross-marketing activities of banks within Massachusetts.

The first of the three provisions discussed in the letter prohibits non-licensed bank personnel from referring bank customers to a licensed insurance agent or broker except upon an inquiry initiated by the customer. *See* Mass. Gen. Laws ch. 167F, § 2A (1998); *see also* Mass. Regs. Code tit. 211, § 142.05(3) (1998); Mass. Regs. Code tit. 209, § 49.06(3) (1998). The second prohibits non-licensed bank personnel from receiving additional compensation for insurance referrals regardless whether the compensation is conditioned upon the sale of insurance. *See* Mass. Gen. Laws ch. 167F, § 2A

(1998); *see also* Mass. Regs. Code tit. 211, § 142.05(3) (1998); Mass. Regs. Code tit. 209, § 49.06(3) (1998). The third prohibits banks from making an insurance solicitation in connection with an application for an extension of credit until after the application has been approved and, in the case of an extension of credit secured by a mortgage on real estate, until after the customer has accepted the bank's written commitment to extend credit. *See* Mass. Gen. Laws ch. 167F, §§ 2A(b)(4)(ii) and (iii); *see also* 211 Mass. Regs. Code tit. 211, § 142.06; Mass. Regs. Code tit. 209, § 49.06(5).

The OCC published notice of the preemption request, see 65 Fed. Reg. 43827 (July 14, 2000), and solicited comments on whether GLBA § 104(d)(2) preempts the state laws in question. The OCC received a total of 110 comments in response to the notice, including comments submitted by Massachusetts. Some comments argued in favor of preemption, some argued against, and some questioned the OCC's authority to weigh in on the subject at all because Congress did not delegate to the OCC authority to determine whether specific state laws are preempted by GLBA § 104(d)(2).

On March 18, 2002, the OCC issued a letter opining that GLBA § 104(d)(2) does indeed preempt the Massachusetts laws at issue. The opinion almost immediately led a number of banking interests to file waiver requests with state regulators seeking permission to engage in activities proscribed by these laws. Massachusetts has held these requests in abeyance, pending resolution of its petition.

In the letter, the OCC responded to comments questioning its right to take a position on the preemptive effect of GLBA § 104(d)(2) by pointing to case law and statutes recognizing, with varying degrees of explicitness, its authority "to interpret, in the first instance, federal laws affecting national bank powers." Importantly, the OCC implicitly conceded that Congress did not authorize it to effect specific GLBA § 104(d)(2) preemptions through administrative conduct—e.g., promulgating regulations, conducting adjudications, issuing licenses

—that carries the force of law. No party or amicus curiae has taken a contrary position, and our independent review of the GLBA persuades us that the OCC reasonably has concluded that, in the present context, it may do nothing more than provide "informal agency guidance of a sort commonly and traditionally offered by the OCC in its role as supervisor of national banks." OCC Brief, at 19 (characterizing the nature of the March 18, 2002 opinion letter).[1]

Because the opinion letter constitutes no more than informal agency guidance to banks and other interested parties, it does not in these circumstances create a "regulatory conflict" giving rise to a case or controversy between OCC and Massachusetts. It is true that informal agency action not carrying the force or effect of law can give rise to a case or controversy where it meets the test for ripeness set forth in *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 148-49, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967) (matter is ripe if it is fit for judicial decision and if withholding court consideration would cause the parties hardship). For example, the opinion letter might well affect banking and insurance interests differently and sufficiently to give rise to a case or controversy between such interests and the OCC. But Abbott requires a showing that the informal action somehow imposes a legal or practical constraint on the party seeking to invoke federal court jurisdiction. *See generally N.Y. Stock Exch. v. Bloom*, 183 U.S. App. D.C. 217, 562 F.2d 736, 741-43 (D.C. Cir. 1977) (declining to find Abbott's hardship requirement met where informal agency action had no immediate effect on the parties invoking the court's jurisdiction); Pierce, Administrative Law Treatise, § 15.15 (4th ed. 2002) (discussing how

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[1] Because we conclude that Massachusetts's petition does not describe a "regulatory conflict" within the meaning of GLBA § 304(a), we do not resolve whether the OCC's issuance of the opinion letter was ultra vires, as the Commonwealth and certain amici argue. Rather, for purposes of our analysis, we shall assume arguendo that the opinion letter was authorized.

courts assessing the justiciability of informal agency action under Abbott have focused on whether the action has some "binding effect" on the plaintiff or petitioner); *cf. Nat'l Automatic Laundry and Cleaning Council v. Schultz*, 143 U.S. App. D.C. 274, 443 F.2d 689, 696-97 (D.C. Cir. 1971) (holding that Labor Department opinion letter concluding that plaintiff's members were violating the Fair Labor Standards Act gave rise to a justiciable controversy because plaintiff's members faced a "Hobson's choice" of either conforming their business practices to the agency's view or risking strong statutory sanctions in any enforcement action under the Act). Here, there has been no such showing with respect to Massachusetts.

In their supplemental briefs, the parties assert that the opinion letter impairs Massachusetts's ability to enforce its laws. But as we already have observed, the letter neither has legal effect nor presages future coercion by the OCC, which claims no entitlement to restrain the states from enforcing preempted law or to authorize third parties to engage in conduct forbidden by preempted law. We thus fail to see how the letter circumscribes Massachusetts's ability to enforce its laws in any meaningful way. If banks within Massachusetts were to act in defiance of state law, the opinion letter in no way affects Massachusetts's entitlement or ability to take responsive action. The parties also suggest that the OCC's issuance of the opinion letter gives rise to a case or controversy because it so strengthened the hand of banking interests seeking to avoid Massachusetts law that it led them to file waiver requests. But it is difficult to see how the filing of a waiver request intrudes on state prerogatives sufficiently to cause the State constitutional injury. *See Vt. Agency of Natural Resources v. United States*, 529 U.S. 765, 771, 146 L. Ed. 2d 836, 120 S. Ct. 1858 (2000) (describing the "injury in fact" requirement of Article III standing). We have found no authority for the proposition that a state may bring an action in an Article III court against the author of, say, an

authoritative but non-binding legal opinion expressed in a Securities and Exchange Commission no-action letter or an Internal Revenue Service private-letter ruling (or, for that matter, in a law review article or treatise) simply because the expression of the opinion prompts a third party to challenge the lawfulness of some state enactment under federal law. So too here.

Because we are unable to discern how the opinion letter constrains Massachusetts in such a way as to give rise to a case or controversy between Massachusetts and the OCC, we do not regard this matter to be a "regulatory conflict" within the meaning of GLBA § 304(a). We so read the statute because a contrary construction would raise grave concerns about its constitutionality as applied here, *see, e.g., Harris v. United States*, 536 U.S. 545, 122 S. Ct. 2406, 2413, 153 L. Ed. 2d 524 (2002), and because there are situations governed by GLBA § 304(a) that raise no Article III concerns, see Petitioner's Initial Brief at 24-25 (listing clearly justiciable conflicts covered by GLBA § 304(a)). Our holding therefore does not render the statute insignificant or superfluous. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001) (counseling against statutory constructions that have such effects). We close on a practical note. The questions Massachusetts's petition seeks to have us adjudicate are unlikely to be purely legal. It is apparent that, in deciding whether state laws are preempted by GLBA § 104(d)(2), courts are going to have to make judgment calls about the extent to which the laws hinder the ability of depository institutions to engage in sales, solicitation, and cross-marketing activities, as a factual matter. Such judgment calls will often be better made on an evidentiary record created in litigation in the trial court. *See Toilet Goods Assn., Inc. v. Gardner*, 387 U.S. 158, 163-64, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967).

Petition dismissed.

APPENDIX D

DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency

[Docket No. 01–22]

Preemption Opinion

AGENCY: Office of the Comptroller of the Currency, Treasury.

ACTION: Notice.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is publishing its response to a written request for the OCC's opinion of whether Federal law preempts certain provisions of the West Virginia Insurance Sales Consumer Protection Act (West Virginia Act or Act). The OCC has determined that Federal law preempts some, but not all, provisions of the West Virginia Act.

FOR FURTHER INFORMATION CONTACT:

Mark Tenhundfeld, Assistant Director, or Mary Ann Nash, Counsel, Legislative and Regulatory Activities Division, (202) 874–5090.

SUPPLEMENTARY INFORMATION: On June 2, 2000, the OCC published in the Federal Register notice of a request from the West Virginia Bankers Association (Requester) for the OCC's opinion concerning whether section 104 of the Gramm-Leach-Bliley Act (GLBA) preempts certain provisions of the West Virginia Act. See Notice of Request for Preemption Determination, 65 FR 35420 (June 2, 2000) (Notice). The OCC is publishing its response to the request as an appendix to this notice.

In the Notice, the OCC requested public comment on whether Federal law preempts the provisions of the West Virginia Act that the Requester had identified. In response,

the OCC received 67 comments from 63 commenters. A number of commenters, including banks and the West Virginia banking trade association, thought that some or all of the provisions in question were preempted. Other commenters opposed preemption, generally asserting that provisions of the West Virginia Act fell within the safe harbor provisions of GLBA or did not prevent or significantly interfere with the ability of a financial institution to engage in any insurance sales, solicitation, or crossmarketing activity.

For the reasons described in the preemption opinion, the OCC has concluded that Federal law preempts some, but not all, of the provisions of the West Virginia Act. In particular, it is the OCC's opinion that Federal law *does not preempt* the following provisions of the West Virginia Act with respect to national banks:

- The Act's prohibition against requiring or implying that the purchase of an insurance product from a financial institution is required as a condition of a loan;
- The Act's provision prohibiting a financial institution from offering an insurance product in combination with other products unless all of the products are available separately; and
- The Act's requirement that, where insurance is required as a condition of obtaining a loan, the insurance and credit transactions be completed independently and through separate documents.

We also conclude that the following provision of the Act *is preempted only in part:*

- With respect to the Act's disclosure requirements, we conclude that the provisions prescribing the content of the disclosures that a financial institution is required to make in connection with the solicitation of an insurance product, and the requirement that a financial institution

that sells insurance obtain a written acknowledgment, in a separate document, from its insurance customer that certain disclosures were provided are not preempted; but that the Act's provisions regarding the manner and timing of certain required disclosures are preempted.

Finally, it is our opinion that Federal law does preempt the following provisions of the West Virginia Act with respect to national banks:

- The Act's provisions requiring financial institutions to use separate employees for insurance solicitations;
- The Act's restrictions on the timing of bank employees' referral or solicitation of insurance business from customers who have loan applications pending with the bank;
- The Act's restrictions on sharing with bank affiliates information acquired by a financial institution in the course of a loan transaction to solicit or offer insurance; and
- The Act's requirement that financial institutions segregate the place of solicitation or sale of insurance so that it is readily distinguishable as separate and distinct from the deposit-taking *and* lending areas.

The analysis used to reach these conclusions and the reasons for each conclusion are described in detail in our reply to the Requester.

Dated: September 24, 2001,

John D. Hawke, Jr.,
Comptroller of the Currency.

Attachment

September 24, 2001
Sandra Murphy, Esq.,
Bowles Rice McDavid Graff & Love,
600 Quarrier St.,
Charleston, West Virginia 25301.

Dear Ms. Murphy: This letter replies to your request, on behalf of the West Virginia Bankers Association, for the opinion of the Office of the Comptroller of the Currency (OCC) concerning whether certain provisions of the West Virginia Insurance Sales Consumer Protection Act (the West Virginia Act)[1] apply to national banks.

For the reasons described in detail in this letter, we have concluded that Federal law preempts some, but not all, of the provisions of the West Virginia Act that you have asked us to review. In particular, it is our opinion that Federal law does not preempt the following provisions of the West Virginia Act with respect to national banks:

- the Act's prohibition, in section 8(a), against requiring or implying that the purchase of an insurance product from a financial institution is required as a condition of a loan;
- the Act's provision, in section 8(b), prohibiting a financial institution from offering an insurance product in combination with other products unless all of the products are available separately; and
- the Act's requirement, in section 11(a), that, where insurance is required as a condition of obtaining a loan, the insurance and credit transactions be completed independently and through separate documents.

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[1] The provisions of the West Virginia Act that you have asked us to review are codified at W. Va. Code §§ 33-11A-6, 33-11A-8 to -11, and 33-11A-13 and -14 (2000). For the sake of simplicity, this letter usually refer to these provisions by section number only. Thus, for example, we refer to § 33-11A-6 as "section 6."

We also conclude that the following provision of the Act is preempted only in part:

- with respect to the Act's disclosure requirements, we conclude that the provisions, in section 9(a), prescribing the content of the disclosures that a financial institution is required to make in connection with the solicitation of an insurance product, and the requirement, in section 9(c), that a financial institution that sells insurance obtain a written acknowledgment, in a separate document, from its insurance customer that certain disclosures were provided are not preempted; but that the Act's provisions, in section 9(a), regarding the manner and timing of certain required disclosures are preempted.

Finally, it is our opinion that Federal law does preempt the following provisions of the West Virginia Act with respect to national banks:

- the Act's provisions, in section 6, requiring financial institutions to use separate employees for insurance solicitations;
- the Act's restrictions, in section 10(a), on the timing of bank employees' referral or solicitation of insurance business from customers who have loan applications pending with the bank;
- the Act's restrictions, in sections 13(b) and 13(c), on sharing with bank affiliates information acquired by a financial institution in the course of a loan transaction to solicit or offer insurance; and
- the Act's requirement, in section 14, that financial institutions segregate the place of solicitation or sale of insurance so that it is readily distinguishable as separate and distinct from the deposit-taking *and* lending areas.

In reaching these conclusions, we have reviewed each of the provisions of the West Virginia Act under the applicable legal standards, including the provisions of the Gramm-Leach-Bliley Act (GLBA)[2] that govern the applicability of State law to national banks. We also have relied on our experience in supervising national banks that engage in insurance activities to evaluate the effects of the State law provisions under consideration here on national banks' ability to conduct an insurance business.

Where the text of the West Virginia Act left some doubt about how a particular provision would be administered or applied as a practical matter, we have relied on the written comment submitted by the Insurance Commissioner for the State of West Virginia and on discussions with the staff of the West Virginia Insurance Department.

In addition, we note that the National Association of Insurance Commissioners (NAIC) has recently adopted revisions to the NAIC's Model Unfair Trade Practices Act (the Model Act) intended to implement the insurance functional regulation framework established by the GLBA. None of the conclusions reached in this letter result in a finding that any of the provisions of the Model Act that were adopted to implement the GLBA would be preempted.

The first section of this letter provides background on the process we used to develop our opinion and addresses the significant comments that we received in response to our publication of notice of your request. The second section describes the framework that governs our legal analysis. Finally, the third section analyzes each of the provisions of the West Virginia Act that you have asked us to review under the applicable principles of Federal preemption.

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[2] See Pub. L. No. 106–102, 113 Stat. 1338 (Nov. 12, 1999).

I. Background: The West Virginia Bankers' Association Request

On April 14, 1997, the State of West Virginia enacted the West Virginia Insurance Sales Consumer Protection Act. The West Virginia Act imposes a number of requirements that affect the insurance sales, solicitation, or cross-marketing activities of financial institutions, including national banks.

By letter dated May 8, 2000, you requested the OCC's opinion on whether section 104 of the GLBA[3] preempts the specific provisions of the West Virginia Act that your letter identified. In support of your request, you asserted that the West Virginia provisions do not fall within the express safe harbor provisions of the GLBA (Safe Harbors),[4] or are more burdensome or restrictive than the Safe Harbors, and impose requirements that prevent or significantly interfere with the ability of national banks to exercise their authority to engage in insurance sales, solicitation, or crossmarketing activities.

On June 2, 2000, the OCC published notice of your request in the Federal Register and requested comments on whether Federal law preempts the West Virginia Act provisions.[5] We received a total of 67 comments from 63 different commenters.[6] Several commenters, primarily banks and West Virginia banking trade associations, supported preemption of some or all of the West Virginia provisions. Commenters

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[3] *Id.* at § 104, 113 Stat. 1352 (1999). Section 104 of the GLBA is codified at 15 U.S.C. 6701. In this letter, we cite section 104 of the GLBA rather than to the provision as codified.

[4] *See* GLBA § 104(d)(2)(B).

[5] *See* 65 FR 35420 (June 2, 2000).

[6] The Independent Insurance Agents of Louisiana submitted five identical letters signed by five different officers; ten organizations representing insurance agents filed identical, or substantially similar, letters; and two organizations representing banks that sell insurance filed virtually identical comments.

opposing preemption generally said that some or all of the provisions under review fall within the Safe Harbors and are therefore protected from preemption. These commenters also asserted that the provisions not covered by a Safe Harbor nevertheless are protected from preemption because they do not "prevent or significantly interfere" with the ability of a financial institution or its affiliate to engage in any insurance sales, solicitation, or crossmarketing activity. The discussion in Section III addresses these points with respect to each State law provision that we conclude is preempted by Federal law.

Some of the commenters opposed to preemption also argued more generally that the OCC lacks the authority to determine whether Federal law preempts the West Virginia provisions. As these comments suggest, Federal courts, rather than the OCC, are the ultimate arbiters of whether Federal law preempts State law in a particular case. There are, nonetheless, sound reasons why the OCC should provide its opinion about the likely outcome of consideration of these issues by Federal courts. As the primary supervisor of national banks, the OCC is uniquely positioned to evaluate the effect of the West Virginia Act on national banks' ability to exercise their Federal authority to sell insurance.

Further, from the practical perspective, in the absence of interpretive advice, national banks that sell, or wish to sell, insurance in West Virginia will face added cost, burden, and uncertainty. Those banks would either have to comply with the provisions of the Act, whether or not they apply under the relevant Federal preemption standards, or risk adverse action by the State. The costs of either alternative, measured both directly and in lost business opportunities, could well be substantial.

A few commenters opposed to preemption asserted that the OCC should not find that Federal law preempts the West Virginia Act provisions because State insurance regulators are, pursuant to the GLBA, responsible for the functional

regulation of the business of insurance. Several commenters made the related argument that West Virginia's interest in protecting consumers pursuant to its insurance sales practices statute should compel the conclusion that Federal law does not preempt the West Virginia Act.

As we discuss fully in the next section of this opinion, however, the GLBA provides that the States' functional regulation authority over insurance activities is subject, in certain respects, to Federal preemption standards. In particular, the question whether a State insurance sales law applies to national banks is resolved by application of the Federal standards to the State provision in question. The next section describes the applicable Federal standards.

II. Federal Preemption Standards

The GLBA provisions that govern how State law applies to national banks (and other depository institutions) are complex. In some respects, the statute retains established standards, together with important judicial precedents. In other respects, it replaces existing standards with new rules. Because the GLBA expressly incorporates the decision of the United States Supreme Court in Barnett Bank of *Marion County, N.A. v. Nelson*[7] for certain purposes, we first review the Barnett decision, then describe the relevant statutory provisions.

A. The Barnett *Decision*

Since the inception of the national bank charter, Federal courts have decided questions about the applicability of State law to a national bank's exercise of its Federally authorized powers by applying principles derived from the Supremacy Clause of the United States Constitution. In Barnett, the Supreme Court considered a Florida law that prohibited a licensed insurance agent from engaging in insurance agency

[7] 517 U.S.C. 25 (1996).

activities if the agent was "associated with, * * * owned or controlled by"[8] a financial institution. The Court held that the Florida statute was preempted by the Federal statute—12 U.S.C. § 92—that authorizes national banks to sell insurance in small towns without regard to affiliation or control.

To reach this conclusion, the Court first reviewed the Federal authority provided to national banks by section 92. It held that section 92 granted to national banks "a broad, not a limited, permission" to sell insurance.[9] In this context, the Court then applied traditional Federal preemption standards,[10]

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[8] Fla. Stat. Ann. § 626.988(2)(1996).

[9] The Court considered a national bank's authority to sell insurance in the historical context of the Federal statutory scheme of national bank regulation.

> [T]he Federal Statute [i.e., section 92] says that its grant of authority to sell insurance is in ''addition to the powers now vested by law in national [banks].'' In using the word ''powers,'' the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental ''powers'' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law.

Barnett, 517 U.S. at 32 (citations omitted).

[10] The Court summarized the three traditional constitutional bases for Federal preemption of State law—express preemption, preemption because Congress has ''occupied the field'' of regulation, and preemption on account of a conflict between Federal and State law—as follows:

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's ''structure and purpose,'' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation ''so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'' Alternatively, federal law

concluding that the Florida statute at issue conflicted with section 92 because the Florida law was "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"[11] in granting national banks the power to sell insurance and was, therefore, preempted.

The Court went on to note that, while Congress's grant of a Federal power cannot be made subject to State-imposed conditions, State statutes having only a small effect on the national bank's exercise of that power may still apply:

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, [prior preemption] cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers.[12]

The Court cited three cases to illustrate the point that State laws will not be preempted if they do not, for example, "unlawfully encroach" upon, "hamper," or "impair" the bank's ability to engage in the authorized activity.[13] The State

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> may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility," or, the state laws may "stan[d] as an obstacle to the accomplishment and execution of the full purposes of and objectives of Congress."

Id. at 31 (citations omitted).

[11] *Id.* at 31 (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

[12] *Id.* at 33 (citations omitted).

[13] *Id.* at 33-34 (citing "*Anderson Nat. Bank v. Luckett,* 321 U.S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not 'unlawful[ly] encroac[h] on the rights and privileges of national banks'); *McClellan v. Chipman,* 164 U.S. 347, 358 (1896) (application to national banks of state statute forbidding certain real estate transfers by insolvent transferees would not 'destro[y] or hampe[r]' national banks'

laws that were found to apply to national banks in these cases did not serve to limit the exercise of bank powers.

Under the standards used by the Court in *Barnett*, a conflict between a state law and Federal law need not be complete in order for Federal law to have preemptive effect. Where a Federal grant of authority is unrestricted, State law that attempts to place limits on the scope and exercise of that authority will be preempted.[14] Thus, Federal law preempts not only State laws that purport to prohibit a national bank from engaging in an activity permissible under Federal law but also State laws that condition or confine the exercise by a national bank of its express or incidental powers.

The *Barnett* case is clear, moreover, that State law does apply when a Federal grant of power to national banks is accompanied by an "explicit statement that the exercise of that power is subject to state law."[15] We next review the relevant provisions of the GLBA to evaluate the extent to which that statute subjects national banks' power to engage in the insurance sales, solicitation, and crossmarketing activities covered to State law.

B. The GLBA's Federal Preemption Standards

The GLBA actually contains several different preemption standards for different aspects of the operations of banks and their affiliates. First, section 104(c)(1) of the GLBA broadly

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functions); *National Bank v. Commonwealth*, 9 Wall. 353, 362 (1870) (national banks subject to state law that does not 'interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government').").

[14] *See*, e.g., *New York Bankers Ass'n, Inc. v. Levin*, 999 F. Supp. 716, 719 (W.D.N.Y. 1998) (holding that a New York statute that restricted the types of insurance banks could sell to their customers was preempted on the grounds that the State law "constitutes an interference with [banks'] rights" to sell insurance).

[15] *Barnett*, 517 U.S. at 34.

preempts any State law that "prevents or restricts" the ability of a national bank (or other depository institution), or its affiliate, from being affiliated with any entity if the affiliation is authorized or permitted by Federal law.[16]

Similarly, section 104(d)(1) preempts any State law that "prevents or restricts" a national bank (or other depository institution), or its affiliate, from engaging in any activity—other than insurance sales, solicitation, or cross-marketing—that is permissible for that entity to engage in under the GLBA.[17]

With respect to insurance sales, solicitation, or cross-marketing activities, section 104(d)(2) precludes any State action that "prevents or significantly interferes" with those activities when conducted by a depository institution or its affiliate.[18] However, the statute expressly protects from pre-emption 13 specified types of restrictions on insurance sales, solicitation, and crossmarketing activities.[19] The Barnett standards for preemption continue to apply, however, to State laws regarding insurance sales, solicitation, and cross-marketing activities that are not covered by (or substantially the same as) these 13 "Safe Harbors."[20]

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[16] *See* GLBA § 104(c)(1). Section 104(c)(2) contains exceptions to this preemption standard for certain types of State regulation of insurance underwriters that are not relevant to our analysis of the West Virginia Act.

[17] *See id.* § 104(d)(1), (2)(B). Section 104(d)(3) excepts from pre-emption under the "prevent or restrict" standard in section 104(d)(1) certain State laws regulating the activities (other than salesrelated activities) of insurance companies (and depository institutions providing savings bank life insurance). *See id.* § 104(d)(3).

[18] *See id.* § 104(d)(2)(A).

[19] *See id.* § 104(d)(2)(B)(i)–(xiii).

[20] State statutes that were enacted after September 3, 1998, also must meet certain non-discrimination standards with respect to those provisions not covered by the Safe Harbors. *See id.* § 104(e). The West Virginia law

These provisions of section 104 require a three-step analysis in order to determine whether a particular State law applies to a national bank. First, if the State law in question is of a type addressed by section 104, it is necessary to determine which preemption standard—that is, which subsection of section 104—governs. Second, if the State law pertains to an insurance sales, solicitation, or cross-marketing activity, then we must determine whether it is protected from preemption by any of the 13 Safe Harbors set forth in section 104(d)(2)(B). Finally, if the State law pertains to insurance sales, solicitation, or cross-marketing but is not protected by any Safe Harbor, the third step is to determine whether Federal law preempts the West Virginia provision under the Barnett standards, as incorporated by section 104(d)(2)(A).

Section 104(d)(2)(A) provides:

> In accordance with the legal standard for preemption set forth in the decision of the *Supreme Court of the United States in Barnett Bank of Marion County N.A.* v. *Nelson*, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.[21]

The text of section 104 makes clear that its "prevent or significantly interfere" standard is the same as the standard that was applied by the Supreme Court in the Barnett case. The standard itself expressly incorporates Barnett. Moreover,

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was enacted on April 14, 1997, and therefore these nondiscrimination provisions are not applicable to this analysis.

Section 104(d)(4) addresses financial activities other than insurance, and thus also is not relevant for purposes of this analysis.

[21] *Id.* § 104(d)(2)(A).

language that appears later in the same paragraph—paragraph (2) of subsection (d)—expressly preserves the *Barnett* decision. That language says that:

> Nothing in this paragraph shall be construed (I) to limit the applicability of the decision of the Supreme Court in *Barnett Bank of Marion County N.A. v. Nelson*, 517 U.S. 25 (1996) with respect to any State statute, regulation, order, interpretation, or other action that is not referred to or described in subparagraph (B); or (II) to create any inference with respect to any State statute, regulation, order, interpretation, or other action that is not described in this paragraph.[22]

The effect of this language is to preserve both the standards that the Supreme Court articulated in the *Barnett* decision and also the analysis that the Court used in that case. Thus, the standard for preemption used by the Court in *Barnett* before enactment of GLBA is the same standard that applies today with respect to State insurance sales, solicitation, or cross-marketing laws that are not covered by a Safe Harbor.

The Senate Report accompanying the GLBA, in commenting on a provision prescribing the "prevent or significantly interfere" standard, using language that was almost identical to the language of section 104(d)(2) as ultimately enacted, confirms this view. The Senate Report states that:

> The Committee believes that State insurance sales, solicitation, and crossmarketing laws adopted prior to September 3, 1998 should be subject to preemption under the preemption standards applicable when such

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[22] *Id.* § 104(d)(2)(C)(iii). The reference in the first clause to subparagraph (B) is to the Safe Harbors. We construe the "no inference" language in the second clause to mean that a State law may not be inferred to be preempted under the "prevent or significantly interfere standard" solely because it is excluded from coverage by one of the Safe Harbors. Accordingly, our analysis in Section III draws no such inferences.

laws were adopted. Thus, it is the Committee's intent that such laws may be subject to preemption under applicable case law, and the statutory preemption standard set forth in subsection 104(d)(2)(A), which is patterned after such case law. There is an extensive body of case law related to the preemption of State law. For example, in *Barnett Bank of Marion County, N.A. v. Nelson*, 116 S.Ct. 1103 (1996), the U.S. Supreme Court noted that Federal courts have preempted State laws that "prevent or significantly interfere" with a national bank's exercise of its powers; that "unlawfully encroach" on the rights and privileges of national banks; that "destroy or hamper" national banks' functions; or that "interfere with or impair" national banks' efficiency in performing authorized functions.[23] The limitation on the application of this standard to State laws adopted prior to September 3, 1998 was deleted in the final legislation.

III. Application of Federal Preemption Standards to the West Virginia Act

A. Summary of the Framework for the Preemption Analysis

As we have described in discussing the applicable Federal preemption standards, we use a three-step analysis to determine whether Federal law preempts the provisions of the West Virginia Act that you have requested us to review. First, we determine which preemption standard in section 104 of the GLBA is applicable.

Each of the West Virginia provisions that you have asked us to review regulates the sales, solicitation, or cross-marketing of insurance. Accordingly, the determination whether each of the provisions applies to a national bank is governed by section 104(d)(2)(A) of the GLBA. Section

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[23] S. Rep. No. 106–44, at 13 (1999).

104(d)(2)(A) establishes the "prevent or significantly interfere" standard, as that standard is set forth in the Supreme Court's *Barnett* decision.

However, one of the provisions that you have identified—section 13 of the West Virginia statute—regulates information sharing between a financial institution and its affiliate. The area addressed by section 13 is also the subject of a Federal statute, the Fair Credit Reporting Act[24] (FCRA), which contains an express preemption provision. Where Congress has expressly preempted State law, there is no need to apply the standards in section 104 of the GLBA to determine that State law's applicability.[25] Accordingly, our analysis of section 13 differs from our analysis of the other provisions you have asked us to review in that it focuses on whether the West Virginia provision is covered by the FCRA's express preemption.[26]

With respect to all of those other provisions, the second step in the analysis is to consider whether the particular provision falls within one or more of the 13 Safe Harbors. A State law that is covered by a Safe Harbor, or that is "substantially the same as but no more burdensome or restrictive than"[27] a Safe Harbor, is protected from Federal

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[24] 15 U.S.C. §§ 1681–1681u (as amended by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), Pub. L. No. 104–208, tit. II, subtit. D, ch. 1, §§ 2401–2422, 110 Stat. 3009–426 to 3009–454 (1996)).

[25] The Supreme Court summarized the three bases on which a Federal statute may preempt State law—express preemption, occupation of the field, and preemption by reason of conflict—in the Barnett decision. See supra note 10, quoting the Court's summary.

[26] The Safe Harbors protect State laws from Federal preemption only under the "prevent or significantly interfere" standard in section 104(d) of the GLBA. Therefore, we do not consider the Safe Harbors in determining whether FCRA preempts these provisions.

[27] GLBA § 104(d)(2)(B).

preemption under the standard in section 104(d)(2)(A). No further analysis is necessary under section 104.[28] A list of the Safe Harbors is attached to this letter as Appendix A.

Finally, if the provision concerns an insurance sales, solicitation or crossmarketing activity, but is not protected by a Safe Harbor, we consider whether it is preempted under the Barnett standards incorporated in section 104.

The determination whether a particular State statute is preempted under the Barnett standards depends on the effect that the State law has on a national bank's ability to exercise its Federally authorized power to engage in insurance agency activities and on the scope of that effect. In the words of the Senate Report discussed in Section II of this letter (summarizing the Barnett holding), State laws are preempted if they:

> "[P]revent or significantly interfere" with a national bank's exercise of its powers; * * * "unlawfully encroach" on the rights and privileges of national banks; * * * "destroy or hamper" national banks' functions; or * * * "interfere with or impair" national banks' efficiency in performing authorized functions.[29]

Accordingly, our review under the *Barnett* standards focuses on how the West Virginia provision affects a national bank's ability to engage in insurance sales, solicitation, and cross marketing activities and on the nature and extent of that effect. This review includes, for example, consideration of the

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[28] State laws covered by a Safe Harbor, however, may not be applicable to national bank insurance activities because of other provisions of Federal law, such as the specific preemption provisions set forth in the FCRA, which are discussed in Section III of this opinion.

[29] S. Rep. No. 106–44, at 13 (1999).

extent to which the substance of an authorized activity is affected and the costs that a bank would likely incur to comply with the State law.[30]

We also consider whether the West Virginia provision imposes requirements that have the same, or substantially the same, effect on a national bank as requirements imposed by Federal law. If, in a Federal statute, Congress has imposed conditions on a national bank's ability to exercise its insurance powers, then a Federal court is unlikely to find that the State statute "prevents or significantly interferes with" the bank's exercise of those powers within the meaning of the *Barnett* standards.

B. Analysis of the Provisions of the West Virginia Act

In this portion of our analysis, we have grouped the West Virginia provisions according to the conclusions we reach with respect to Federal preemption. We first discuss those provisions that we conclude are not preempted under the Federal preemption standards we have described. We next address one provision that we conclude is preempted only in part. Finally, we discuss the provisions that we conclude are preempted. Within that grouping, we address the provisions in the order in which they appear in the West Virginia statute.

1. West Virginia Provisions That Are Not Preempted

Section 8—Tying Restrictions

Section 8 of the West Virginia statute generally restricts the tying of insurance products and other products or services

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[30] In *Association of Banks in Ins., Inc.* v. *Duryee,* 55 F. Supp. 2d 799 (S.D. Ohio 1999), *appeal docketed,* No. 99–3917 (6th Cir. July 19, 1999), the court found that complying with the state statute "might . . . entail a substantial financial expense which could weigh significantly against the expected revenue from the sale of insurance in that small town, and therefore significantly impair the bank's ability to sell insurance." *Id.* at 809.

offered by the bank. You have asked us to review both provisions of this section, and the following discussion addresses each provision separately.[31]

Section 8(a)—Tying of Products Prohibited

Section 8(a) of the West Virginia Act prohibits a financial institution from requiring or implying that the purchase of an insurance product from that institution is required as a condition of lending money or extending credit.

The Insurance Commissioner for the State of West Virginia (the Commissioner) asserted in his comment letter that Section 8(a) is protected by Safe Harbor (viii).[32] Safe Harbor (viii) protects State laws that prohibit financial institutions from requiring a customer to obtain insurance from that institution, or an affiliate of that institution, as a condition of obtaining the extension of credit.

As we have noted, the Safe Harbors protect State provisions that are "substantially the same as but no more burdensome or restrictive than" the restrictions in the Federal statutory text. Section 8(a) prohibits a person from requiring or implying that an individual applying for a loan or extension of credit must purchase an insurance product from the financial institution to obtain approval of the loan or

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[31] Specifically, Section 8 of the West Virginia Act provides that:

> (a) No person shall require or imply that the purchase of an insurance product from a financial institution by a customer or propsective customer of the institution is required as a condition of the lending of money or extension of credit.
>
> (b) No financial institution may offer an insurance product in combination with its other products, unless all the products are available separately from the financial institution.

W. Va. Code § 33–11A–8 (2000).

[32] *See* Comment Letter from Hanley C. Clarke, Insurance Commissioner, State of West Virginia, dated June 30, 2000, at 4 (hereinafter "Commissioner's Letter").

extension of credit. The provision thus includes a phrase—"or imply"—that does not appear in the language of Safe Harbor (viii). The Commissioner argues that this provision "contains the precise restriction" found in Safe Harbor (viii),[33] but acknowledges that Section 8(a) "merely restricts bank employees from requiring or suggesting that in order to obtain loan approval, the customer must purchase insurance from that financial institution."[34] The language of section 8(a) thus is more restrictive than the language of Safe Harbor (viii).

Moreover, Safe Harbor (viii) also includes certain exemptions that are not contained in section 8(a). The first exemption excludes from protection a State law imposing a prohibition that would prevent a bank or its affiliate from engaging in an activity "that would not violate" 12 U.S.C. § 1972[35] as interpreted by the Board of Governors of the Federal Reserve System (FRB).[36] The second exemption excludes from protection a State law that would prevent a bank from informing a customer that insurance is available from the bank, or from a subsidiary or affiliate. The scope of the West Virginia provision is broader than the scope of Safe Harbor (viii) and, therefore, we conclude that section 8(a) is not protected from preemption by the Safe Harbor.

However, we also conclude that the provision is not preempted under the *Barnett* standards. National banks are already required to comply with tying restrictions in Federal law that are similar to those contained in the West Virginia provision. Section 1972 generally prohibits a bank from extending credit, leasing or selling property, furnishing serv-

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[33] *Id.*

[34] *Id.* (emphasis added).

[35] Section 106 of the Bank Holding Company Act Amendments of 1970, Pub.L. No. 91-607, § 106, 84 Stat. 1760, 1766 (1970) (codified at 12 U.S.C. 1972).

[36] *See* 12 CFR 225.7.

ices, or fixing or varying prices of these transactions, on the condition or requirement that the customer obtain additional credit, property, or service from the bank, subject to certain exceptions.[37] A bank engages in a tie for purposes of section 1972 by conditioning the availability of, or offering a discount on, one product or service (the "tying product") on the condition that the customer obtain some additional product or service.[38] For example, a national bank may not condition the extension of credit or the reduction of the price of credit on a customer purchasing insurance from the bank.

Several commenters suggested that Federal law should preempt section 8(a) because that provision would prohibit a bank employee from mentioning to the customer that the insurance products may be available at a discount as part of a package. Others questioned whether the bank employee could even tell the customer that the bank sells insurance. The West Virginia Insurance Department has advised us that it does not

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[37] *See* 12. U.S.C. 1972(1). For example, the statutory traditional bank product exception permits a bank to extend credit, lease or sell property, furnish services, or fix or vary prices on the transactions, on the condition that the customer obtain a loan, discount, deposit, or trust service from the same bank. *See id.* § 1972(1)(A). Further, the statute authorizes the Federal Reserve Board (FRB) to permit, by order or regulation, additional exceptions to the tying prohibitions. *See id.; see also* 12 CFR 225.7(b). In 1997 the FRB adopted significant changes to its tying restrictions. *See* 62 Fed. Reg. 9290, 9312–16 (Feb. 28, 1997). As stated by the FRB, these changes are designed to enhance competition in banking and nonbanking products and allow banks and their affiliates to provide more efficient and lower cost service to customers. *See id.* at 9312; *see also* 12 CFR 225.7(b)(2); Citigroup, Inc., FRB Interpretive Letter, [Current Binder] Fed. Banking L. Rep. (CCH) ¶ 80–292, at 89,220 (May 16, 2001) (describing the safe harbors for combined discount programs, where the FRB has permitted banks to vary the consideration for a product or package of products if the customer maintains a minimum balance in certain products specified by the bank, which may include insurance products.)

[38] *See* 60 FR 20186, 20187 (Apr. 25, 1995).

interpret section 8(a) to impose these restrictions. Based upon this representation, we conclude that section 8(a) of the West Virginia Act would not be preempted.

Section 8(b)—Separate Availability Provision

Section 8(b) provides that a financial institution may not offer an insurance product in combination with its other products, unless all the products are available separately from that institution. Offering products or services in combination, often at a reduced price, is known as "bundling" and is a common business practice among banks that sell insurance.

No Safe Harbor protects State separate availability provisions from preemption. In fact, as we have described, Safe Harbor (viii) expressly excludes from preemption protection State anti-tying provisions that prohibit conduct "that would not violate" the Federal anti-tying statute.

It appears that the plain language of section 1972 would permit the bundling of insurance and traditional banking products. Section 1972 prohibits a bank from conditioning the availability of, or offering a discount on, one product or service on the customer's obtaining an additional product or service. By its terms, however, the statute does not prevent a bank from conditioning the availability of, or offering a discount on, any product or service if the availability or price of the product or service depends on the customer's obtaining a "loan, discount, deposit, or trust service" from the same bank.[39] As explained by the FRB, this statutory "traditional bank product exception" permits a bank "to tie any product or

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[39] "A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service. . . ."

12 U.S.C. § 1972(1) (emphasis added).

service to a loan, discount, deposit, or trust service offered by that bank."[40] Because section 8(b) of the West Virginia statute contains no exception for bank insurance sales, solicitation, or crossmarketing practices that appear to be permissible under the terms of the Federal anti-tying statute, section 8(b) is more restrictive than, and thus not protected from preemption by, the Safe Harbor.

In our opinion, however, the state separate availability provision is not preempted under the *Barnett* standards. Banks' ability to package products and services together enables them to provide products and services more efficiently and, therefore, to compete more effectively with other providers of financial services.[41] Moreover, as some

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[40] 62 Fed. Reg. at 9314 (preamble to final rule amending the FRB's anti-tying regulation to, among other things, permit interaffiliate tying arrangements that are permissible under the statutory traditional bank product exception).

[41] The FRB has recognized the benefits and efficiencies of bundling products. The FRB's antitying rule formerly provided that the statutory traditional bank production exception would be available to banks (and bank holding companies and nonbank affiliates thereof) "only if all products involved in the tying arrangement were separately available for purchase." 12 CFR 225.7(c) (1997). In 1997, as part of a package of significant changes to its anti-tying regulation, the Board eliminated the "separately available" requirement. In describing its reasons for the changes made to the anti-tying provisions, the Board explained that these changes "remove Board-imposed tying restrictions on bank holding companies and their nonbank subsidiaries; create exceptions from the statutory restriction on bank tying arrangements to allow banks greater flexibility to package products with their affiliates; and establish a safe harbor from the tying restrictions for certain foreign transactions." Further, the FRB indicated that these changes "are designed to enhance competition in banking and nonbanking products and allow banks and their affiliates to provide more efficient and lower-cost service to customers." See 62 FR 9290 at 9312–13. The FRB's current rules limit the availability of the statutory traditional bank product exception only by

commenters pointed out, bundling offers consumers the benefits of lower prices, the opportunity to consider the purchase of additional products as a result of crossmarketing, and one-stop shopping. The West Virginia provision does not prevent national banks from packaging products in the way that Federal law permits in order to realize these benefits, so long as the products are also available separately. Moreover, it does not hamper a national bank from pricing its products in a way that reflects the differences in cost and efficiency that may result depending on whether insurance is sold separately or is bundled with another product. Therefore, we conclude that Federal law does not preempt subsection 8(b) under the *Barnett* test set forth in section 104(d)(2) of GLBA.

Section 11(a)—Independent Documentation of Insurance and Credit Transactions

Section 11(a) provides that an extension of credit and insurance sales transaction must be completed independently and through separate documents when insurance is required as a condition of the loan.[42] Although Safe Harbor (xi) protects State restrictions requiring separate documentation for insurance and credit transactions, it excepts credit insurance and flood insurance from protection. A bank would have to maintain separate documents for credit insurance and flood insurance in order to comply with the West Virginia provision. As a result, Section 11(a) is more burdensome than Safe Harbor (xi). It covers transactions that the Safe Harbor

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providing that the exception, and a bank's authority to use it, will terminate in a case where a tying arrangement is resulting in anti-competitive practices. 12 CFR § 225.7(c) (2001).

[42] Specifically, section 11(a) of the West Virginia statute provides:

> If insurance is required as a condition of obtaining a loan, the credit and insurance transactions shall be completed independently and through separate documents.

W. Va. Code § 33–11A–11(a) (2000).

expressly excludes and, therefore, imposes an additional paperwork burden and associated administrative costs on banks. Accordingly, the Safe Harbor does not protect section 11(a) from preemption.

Some commenters asserted that the West Virginia provision should be preempted under the Barnett standards because the use of the word Independently" implies that an additional, undefined act must occur beyond the completion of separate documents. Many of these commenters argued, for example, that the provision requires customers to make a separate trip to the bank to sign documents. The West Virginia Insurance Commissioner, however, has stated that "[n]othing in the state statute requires a customer to make separate visits to the bank; it merely requires the credit and insurance transactions be completed independently through the signing of separate documents.* * *"[43]

Based upon this representation, we conclude that the separate documentation requirement for credit and flood insurance transactions when insurance is required as a condition of the loan is not preempted. First, section 11(a) does not affect these types of insurance transactions unless insurance is required as a condition of the loan. Second, the additional requirement for separate documentation if these types of insurance are required as a condition of a loan would not appear to substantially affect the underlying insurance activities.

2. West Virginia Provision That Is Preempted Only in Part

Section 9—Disclosure Provisions

Section 9(a)—Content of Required Disclosures

Section 9 of the West Virginia Act generally contains disclosure requirements that apply when a bank solicits or sells insurance. In particular, section 9(a) of the Act requires

[43] Commissioner's Letter, *supra* note 31, at 7.

banks soliciting or selling insurance to make certain disclosures to customers.[44] The bank must disclose that its insurance products are not deposits; are not Federally insured; are not guaranteed by any insured depository institution; and, where appropriate, that the products carry investment risk, including a potential loss of principal.

The content of the disclosures required by section 9(a) is substantially the same as that of the disclosures protected by Safe Harbor (x). Although there are some differences in wording between the West Virginia provision and Safe Harbor (x), the similarities predominate so that it is "no more burdensome or restrictive" for a bank to give the State disclosures than to give those described in the Safe Harbor. Accordingly, the West Virginia requirement that these disclosures be given is not preempted.

You have also asked us, however, to review two other aspects of the West Virginia disclosure requirements: the

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[44] Section 9(a) of the West Virginia Act provides:

> A financial institution soliciting the purchase of or selling insurance, and any person soliciting the purchase of or selling insurance on the premises of, in connection with a product offering of, or using a name identifiable with, a financial institution, shall prominently disclose to customers, in writing in clear and concise language, including in any advertisement or promotional material, and orally during any customer contact, that insurance offered, recommended, sponsored, or sold:
>
> (1) Is not a deposit;
>
> (2) Is not insured by the federal deposit insurance corporation or, where applicable, the National Credit Union Share Insurance Fund;
>
> (3) Is not guaranteed by any insured depository institution; and
>
> (4) Where appropriate, involves investment risk, including potential loss of principal.

W. V. Code § 33–11A–9(a)(2000).

provisions that relate to the manner and timing of the disclosures and the provision requiring a bank to obtain acknowledgments that the disclosures have been given.

Section 9(a)—Manner and Timing of Required Disclosures

Section 9(a) requires that national banks soliciting or selling insurance make the disclosures in writing, including in connection with advertisements and promotional material, and orally "during any customer contact." [45]

The manner and timing requirements for the disclosures required by the West Virginia provision are more far-reaching than Safe Harbor (x). Section 9(a) requires the bank to make the disclosures "in any advertisement or promotional material, and orally during *any* customer contact." [46] Safe Harbor (x) is more limited in scope, protecting only State law provisions that require the bank to make the disclosure "prior to the sale" of an insurance policy. Moreover, section 9(a) requires disclosures to be made "prominently * * * in clear and concise language," whereas Safe Harbor (x) covers State laws that require the disclosures to be "clear and conspicuous * * * where practicable." Omission of the phrase, "where practicable," eliminates an important qualification on the disclosure requirement.

The West Virginia Insurance Commissioner acknowledged that requiring disclosures in advertisements and promotional material might "be of concern," but the Commissioner believes they "could arguably fall within" Safe Harbor (iii).[47] Although Safe Harbor (iii) does apply to advertisements or other insurance promotional material, it only protects State restrictions that prohibit misleading advertisements or other insurance promotional material; it does not protect State laws

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[45] *Id.*

[46] *Id.* (emphasis added).

[47] Commissioner's Letter, *supra* note 31, at 6.

that require disclosures in advertisements and promotional material, nor does it address oral disclosures during any customer contact. Therefore, section 9(a) is not covered by any of the Safe Harbors because it is more far-reaching than either Safe Harbor (x) or Safe Harbor (iii).

In our opinion, the manner and timing requirements of section 9(a) are preempted under the Barnett standards. Requiring banks to include these disclosures in all advertisements or promotional materials would increase a bank's operating costs and substantively hamper the bank's marketing activities.[48] For example, in cases where the promotional materials only mention insurance as one of several products offered the bank may nonetheless be required to provide the full panoply of disclosures. This is likely to confuse customers and, consequently, impair the bank's insurance solicitation and sales activities.[49]

The requirement to provide the disclosures orally during *any* customer contact also substantially impedes the bank's ability to solicit and sell its insurance products. It places additional burdens on banks to train personnel and to develop procedures to ensure compliance with this requirement. The restriction is also impractical in that it may result in multiple disclosures to the same person—a scenario that could be confusing and adversely affect the bank's ability to market its product.

This increased cost and burden is especially troublesome for small banks. The ability of these banks to meet community needs depends on the bank being able to provide these

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[48] One commenter noted that the additional space required for advertisements and promotional materials would add to the marketing expense.

[49] By contrast, the Federal insurance consumer protection regulations do not require the disclosures to be made in advertisements and promotional materials that are of a general nature describing or listing the services or products offered by the bank. *See* 12 CFR § 14.40(d).

products and services in an affordable and efficient manner. These banks generally need to keep costs down to offer a full array of products and services in the communities they serve.

Finally, unlike the Federal insurance consumer protection regulations,[50] section 9(a) makes no exceptions for sales or solicitations that are conducted by telephone or through electronic means. This could have the effect of prohibiting insurance sales by telephone because it would be impossible to provide a written disclosure in those circumstances. Although we conclude that the manner and timing of the disclosure requirements of section 9(a) are preempted as applied to the solicitation and sale of insurance using traditional means, the potential effect of these requirements on solicitations and sales through alternative media provides an additional basis for preemption.

Section 9(c)—Written Acknowledgment of Required Disclosures

Section 9(c) requires the bank to obtain, prior to or at the time of an application for insurance, a written acknowledgment that a customer has received the disclosures.[51] It also requires the acknowledgment to be contained in a separate document.

None of the GLBA Safe Harbors applies to section 9(c). Safe Harbors (ix) and (x) address required disclosures, but

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[50] *See* 12 U.S.C. 1831(x); 12 CFR part 14.

[51] Section 9(c) of the West Virginia Act provides:

> (c) Any person required under subsections (a) or (b) of this section to make disclosures to a customer shall obtain a written acknowledgment of receipt by the customer of such disclosures, including the date of receipt and the customer's name, address, and account number, prior to or at the time of any application for insurance sold by the person. Such acknowledgment shall be in a separate document.

W. Va. Code § 33-11A-9(c) (2000).

neither of those Safe Harbors protects State provisions requiring that banks obtain a written acknowledgment from customers.

In our view, however, section 9(c) is not preempted under the Barnett standards when applied to in-person insurance applications. Several commenters suggested that the requirement to provide the written acknowledgment in a separate document at or prior to the time of application for a loan significantly interferes with the bank's ability to engage in insurance activities. Federal law, however, imposes a similar requirement.

The insurance consumer protection standards required by section 305 of the GLBA include a requirement that a bank obtain an acknowledgment of the disclosures specified by section 305.[52] The implementing regulations issued by the OCC and the other Federal banking agencies require that this acknowledgment be written, unless the transaction is conducted online or over the telephone.[53] There are differences

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[52] Section 305 of GLBA directed the Federal banking agencies to promulgate certain consumer protection regulations relating to the sale, solicitation and advertising of insurance products by depository institutions and persons selling insurance on the premises of depository institutions or otherwise on behalf of such institutions. 12 U.S.C. 1831x(a). Section 305(g)(2) explains the relationship between these regulations and State laws that are in effect in that jurisdiction. Pursuant to § 305(g)(2), these Federal regulations do not override inconsistent State laws unless the agencies jointly determine that the Federal regulations provide better consumer protections than the State provisions. The State then is given up to 3 years to override that determination. Section 305(g) relates solely to the preemptive effect to be given to Federal regulations promulgated under section 305(a). By its terms, it does not relate to the preemptive effect that is to be given to other Federal regulations or statutes. In the insurance sales area, this is determined pursuant to section 104 of the GLBA and the Barnett case standards incorporated therein.

[53] *See* 12 U.S.C. 1831x(c)(1)(F); 12 CFR 14.40(c)(7) (OCC consumer acknowledgment requirement).

between the acknowledgment required by section 305 and the agencies' regulations and that required by section 9(c) of the West Virginia Act, including West Virginia's requirement as to the content of the acknowledgment and its requirement that the acknowledgment be contained in a separate document. These differences do not impose significant new costs or require the sacrifice of operational efficiencies because national banks are already required to adjust the way they solicit and sell insurance to allow for the obtaining of the acknowledgment required by Federal law.

We note, however, that section 9(c) does not provide any exceptions or alternatives for obtaining acknowledgements when insurance sales are conducted by means other than face-to-face contact between the sales representative and the customer. For example, it is unclear how a bank could obtain a written acknowledgement at the time of application if the sales transaction is conducted by telephone.[54] The West Virginia Insurance Commissioner's office has stated that it will consider alternatives to accommodate this concern. Our conclusion that section 9(c) is not preempted under the Barnett standards therefore addresses only the application of the acknowledgement to face-to-face sales transactions. We believe that section 9(c) would be preempted if applied in the context of sales transactions conducted online or over the telephone.

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[54] The Federal regulations permit a national bank to obtain an electronic acknowledgment when the insurance sale occurs over the Internet and, subject to certain conditions, permit oral acknowledgment when the sale is concluded over the telephone. *See* 12 U.S.C. 1831x(c)(1)(F); 12 CFR 14.40(c)(7) & accompanying preamble discussion at 65 FR 75822, 75828–29 (Dec. 4, 2000).

3. West Virginia Provisions That Are Preempted

Section 6—Use of Separate Employees for Insurance Solicitations

Section 6 generally prohibits financial institution employees with lending responsibilities from soliciting the sale of insurance. Financial institutions with locations having three or fewer individuals with lending authority may use one of these individuals to solicit insurance as long as that individual is not the person primarily responsible for making the loan. This provision also permits small institutions to seek a waiver from the state insurance commissioner where the same individual is the licensed agent or broker and the sole individual with lending authority.[55]

There is no Safe Harbor that applies to this provision. Two of the Safe Harbors—Safe Harbor (xi) and Safe Harbor (xiii)—address the separation of the insurance transaction

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[55] Specifically, section 6 of the West Virginia Act provides that:

> (a) Solicitation for the purchase or sale of insurance by a financial institution shall be conducted only by individuals whose responsibilities do not include loan transactions or other transactions involving the extension of credit. Provided, That for a financial institution location having three or less individuals with lending authority, solicitation for the sale of insurance may be conducted by an individual with responsibilities for loan transactions or other transactions involving the extension of credit, as long as the individual primarily responsible for making the specific loan or extension of credit is not the same individual engaged in the solicitation of the purchase or sale of insurance for that same transaction.
>
> (b) In the event that in any small office, the same individual is the licensed agent or broker and the sole individual with lending authority, the commissioner may grant a waiver of the requirements of this section upon a written request. Such request shall include documentation that, due to the small office staff, compliance is not possible, and include identification of other steps which will be taken to minimize the customer confusion prohibited by this article.

W. Va. Code § 33-11A-6 (2000).

from the credit transaction. However, these Safe Harbors only cover State laws involving record keeping and documentation requirements; they do not address State laws that restrict individuals with lending responsibilities from soliciting the purchase or sale of insurance. None of the Safe Harbors protect State laws that prohibit bank employees with lending responsibilities from also selling insurance.

Section 6 prevents any employee engaged in lending activities from soliciting or purchasing the sale of insurance and, conversely, precludes an employee selling insurance from also having any lending responsibilities. The restriction would apply to loan officers, customer service representatives, and branch managers, even if there is no connection between a given lending activity and the employee's insurance solicitation and sales activities. Thus, at a minimum, section 6 would require national banks to maintain a separate sales force for insurance products.[56]

This requirement in essence prohibits a bank from using the bank's existing personnel resources to solicit and sell insurance, forcing it to artificially configure its operations to establish segregated personnel who sell insurance and may have no responsibilities related to extensions of credit. The requirement is thus hugely disruptive of normal bank operations since it would require the bank to specially isolate insurance sales personnel not just from typical loan applications, but also credit card applications and transactions, and even bank accounts with overdraft features. Not only does the requirement prevent the bank from operating efficiently by using the same employees to perform multiple duties, it forces the bank to operate inefficiently and to incur additional costs that undermine its ability to compete. This burden and

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[56] Several commenters stated that this provision would require banks to hire additional personnel to sell insurance, incur additional expenses and limit the bank's most effective allocation of its resources.

intrusion into the substance of bank operations, in our view, cause section 6 to be preempted under the standards set forth in Barnett.[57]

Section 6 contains an exception from the general restriction for locations that have three or fewer individuals with lending authority. Individuals with lending authority in these locations also may sell insurance, *provided* that the same individual does not both lend and sell insurance on the same transaction. A bank also may seek a *waiver* from the general restrictions of section 6 for small offices where the same individual is the licensed agent or broker and the sole individual with lending authority.

Neither of these exceptions saves the provision from preemption under Barnett. First, unless a Federal statute specifically directs the application of state law, a state may not limit or condition a national bank's exercise of its Federal authority to sell insurance or to engage in other permissible banking functions.[58] Both the proviso and the waiver

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[57] Section 6 also has subtle, but consequential, negative consumer protection implications which may substantially affect the reputation risk arising from banks' insurance sales activities. By requiring a separate insurance sales force, the provisions may effectively require many banks to use a sales force compensated through a traditional commission structure. If banks were able to use employees to sell insurance who also had other types of responsibilities within the bank, those employees would have other bases for their income and there would be less incentive for them to be overly aggressive selling insurance products. Forcing banks to use a particular type of insurance sales force thus could have safety and soundness implications by increasing a bank's reputation risk.

[58] "[W]here Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the [Supreme] Court has ordinarily found that no such condition applies."*Barnett Bank of Marion County, N.A.* v. *Nelson,* 517 U.S. 25, 34 (1996), citing *Franklin Nat'l Bank of Frankin Square* v. *New York,* 347 U.S. 373, 378 & n.7 (1954). Cf. 66 Fed. Reg. 34792, 34798 (July 2, 2001) (adding to Part 9 of the OCC's rules a new subsection, to be codified at 12 C.F.R. § 9.7(e)(2), providing

provision in section 6 of the West Virginia statute have the effect of imposing conditions on the exercise of those activities and both are, thus, impermissible under the Barnett standards.

Section 10(a)—Timing of Insurance-Related Referrals or Solicitations

Section 10(a) generally prohibits a financial institution from making an insurance-related referral or solicitation of a loan customer until after the bank has approved the loan or credit. Subsection 10(b) permits a bank to inform a customer that insurance is required to obtain a loan and to contact consumers through direct or mass mailing so long as it is not done in connection with the bank's decision on whether to grant the consumer's application.[59]

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that, except as made applicable by Federal statute, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks).

[59] Specifically, section 10 of the West Virginia Act provides that:

> (a) No individual who is an employee or agent of a financial institution, or of a subsidiary or affiliate thereof, may, directly or indirectly, make an insurance-related referral to or solicit the purchase of any insurance from a customer knowing that such customer has applied for a loan or extension of credit from that financial institution before such time as the customer has received a written commitment with respect to such loan or extension of credit, or, in the event that no written commitment has or will be issued in connection with the loan or extension of credit, before such time as the customer receives notification of approval of the loan or extension of credit by the financial institution and the financial institution creates a written record of the loan or extension of credit approval.
>
> (b) This provision shall not prohibit any individual subject to subsection (a) above from:
>
> (1) Informing a customer that insurance is required in connection with a loan; or

None of the Safe Harbors protects a State law that restricts the timing of bank insurance solicitations.

In our opinion, section 10(a) is preempted under the Barnett standards. The provision restricts the time and, therefore, the methods by which a bank may solicit an insurance sale from a customer and thus substantively affects the bank's ability to solicit and sell insurance products. For example, section 10(a) would require banks to develop databases to keep track of customers that have loans pending with the bank. Banks also will have to institute methods of communicating this information to its sales force and of apprising the sales force of changes as they occur. Solicitations through mass mailings present additional difficulties requiring bank staff to remove from the mass mailing those individuals who have loans pending with the bank. The cost of developing and maintaining these procedures would impair the bank's ability to engage in insurance activities and frustrate its ability to pursue particular sales activities.

Section 10(a) also imposes significant restrictions on the bank's ability to crossmarket its products. For example, many banks offer one-stop shopping as a convenient and efficient means of servicing customers.[60] Prohibiting the bank from soliciting insurance at this point will force the customer to shop elsewhere. For all of the foregoing reasons, therefore, in our view section 10(a) is preempted.

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(2) Contacting persons in the course of direct or mass mailing to a group of persons in a manner that bears no relation to the person's loan application or credit decision.

W. Va. Code § 33–11A–10 (2000).

[60] Some commenters have stated that the initial face-to-face meeting at which the credit application is taken is often the principal time at which insurance is offered and may, in some cases, be the only face-to-face meeting between the bank and the customer.

Section 13—Sharing of Insurance Information With Affiliated Entities

Section 13 generally prohibits a financial institution from using insurance information obtained in the making of a loan to solicit or offer insurance to the customer, unless the bank first obtains the customer's written consent. You have asked us to opine specifically with respect to sections 13(b) and 13(c). Section 13(b) requires the customer to consent in writing to the bank's disclosure of insurance information to an agent or broker affiliated with the bank, no less than two days after the time of application for, approval of and making of the loan or extension of credit. Section 13(b) requires the bank to obtain this consent in a separate document.[61]

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[61] Specifically, section 13 of the West Virginia Act provides that:

> (a) When a financial institution requires a borrower to provide insurance information in connection with the making of a loan or extension of credit, neither such financial institution nor an insurance agent or broker affiliated with such financial institution may later use the information so obtained to solicit or offer insurance to such borrower, unless the consent required in subsection (b) below is first obtained.
>
> (b) A borrower may consent to the financial institution's disclosure of insurance information to an agent or broker affiliated with the financial institution, but any such consent must be in writing and be given at a time subsequent, which shall be no less than two days, to the time of the application for, approval of and making of the loan or extension of credit.
>
> (c) Consent under subsection (b) of this section shall be obtained in a separate document, distinct from any other transaction, and shall not be required as a condition for performance of other services for the customer.

W. Va. Code § 33-11A-13 (2000).

As we indicated at the outset of this letter, the FCRA[62] expressly preempts any state law that restricts or prohibits the sharing of information among affiliated entities. The FCRA preemption provision states:

> No requirement or prohibition may be imposed under the laws of any State * * * with respect to the exchange of information among persons affiliated by common ownership or common corporate control * * *.[63]

The language of this provision is broad and, on its face, appears to cover the restrictions on information sharing with affiliates contained in section 13 of the West Virginia statute. To determine whether it preempts the West Virginia provision, we first briefly review the purposes and scope of the FCRA, then consider whether the special anti-preemption rule contained in the McCarran-Ferguson Act applies.

Purpose and scope of the FCRA as amended. The purpose of the FCRA is to require consumer reporting agencies to "adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information" that operate in a fair and equitable manner to ensure accuracy and confidentiality.[64] To protect con-

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[62] 15 U.S.C. 1681–1681u (as amended by the Economic Growth and Regulatory Paperwork Reduction Act of 1996 (EGRPRA), Pub. L. No. 104-208, tit. II, subtit. D, ch. 1, §§ 2401–2422, 110 Stat. 3009-426 to 3009-454 (1996)).

[63] 15 U.S.C. 1681t(b)(2) (as amended by EGRPRA tit. II, subtit. D, ch. 1, § 2419, 110 Stat. 3009–452 to 3009–453 (1996)). This preemption provision remains in effect until January 1, 2004. *See id.* § 1681t(d)(2). The only state law not subject to this preemption is Vt. Stat. Ann. tit. 9, § 2480e(a) or (c)(1). *See id.* § 1681t(b)(2).

[64] *Id.* § 1681(b) (emphasis added).

sumers, the FCRA imposes various obligations on "consumer reporting agencies' [65] and on users of "consumer reports." [66]

A "consumer report" is "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" that is collected or used (or expected to be used) to establish the consumer's eligibility for "credit or insurance to be used primarily for personal, family or household purposes; employment purposes; or any other purpose" permissible under the Act.[67] If information is not a "consumer report," any person or entity may share and use the information. Under the FCRA, a "consumer report" does not include "experience information," which is information that relates solely to transactions or experiences between the consumer and the person making the report.[68]

In addition to "experience information," Congress enacted amendments to the FCRA in September 1996 ("FCRA amendments")[69] to expand the category of non-consumer report information to include:

> [A]ny communication of other information among persons related by common ownership or affiliated by

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[65] A "consumer reporting agency" is any party that regularly assembles or evaluates consumer information for the purpose of furnishing consumer reports to third parties. *Id.* § 1681a(f).

[66] A national bank may be either a consumer reporting agency or a user of a consumer report.

[67] 15 U.S.C. 1681a(d)(1) (as amended by the EGRPRA tit. II, subtit. D, ch. 1, § 2402(e), 110 Stat. 3009–428 (1996)) (emphasis added).

[68] *See id.* § 1681a(d)(2)(A)(i) (as amended by the EGRPRA tit. II, subtit. D, ch. 1, § 2402(e), 110 Stat. 3009–428 (1996)).

[69] *See* EGRPRA, Pub. L. No. 104–208, 110 Stat. 3009 (1996) (generally effective Sept. 30, 1997).

> corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons * * *.[70]

The information that may be shared pursuant to the notice and opt-out requirements is not limited. It may include application information, medical information, consumer report information, information derived from consumer reports, and all other information. Thus, the FCRA amendments permit affiliated entities to share any or all information without becoming a "consumer reporting agency."[71] The affiliated entities must comply with the FCRA notice and opt-out requirements, however, before sharing any information other than experience information.[72]

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[70] 15 U.S.C. § 1681a(d)(2)(A)(iii) (as amended by EGRPRA tit. II, subtit. D, ch. 1, § 2402(e), 110 Stat. 3009–428 (1996)).

[71] For a "consumer reporting agency" furnishing reports containing medical information, additional requirements under FCRA may be applicable. *See, e.g.*, 15 U.S.C. § 1681b(g) (as amended by EGRPRA tit. II, subtit. D, ch. 1, § 2405, 110 Stat. 3009–434 (1996)) ("A consumer reporting agency shall not furnish for employment purposes, or in connection with a credit or insurance transaction, a consumer report that contains medical information about a consumer, unless the consumer consents to the furnishing of the report."). A national bank will not become a "consumer reporting agency" simply because it shares with an affiliate experience information or other information that ordinarily would be considered consumer report information so long as the bank shares the other information in accordance with the notice and opt-out requirements.

[72] There are no notice and opt-out requirements when any entities, whether affiliated or not, share "experience information." *Id.* § 1681a(d)(2)(A)(i) (as amended by EGRPRA tit. II, subtit. D, ch. 1, § 2402(e), 110 Stat. 3009-428 (1996)). Prior to the FCRA amendments, a financial institution could regularly exchange consumer information

The FCRA preemption provision ensures that affiliated entities may share customer information without interference from State law and subject only to the FCRA notice and opt-out requirements if applicable. The preemption is broad and extends beyond state information sharing statutes to preempt any State statute that affects the ability of an entity to share any information with its affiliates.[73] Congress intended the preemption provision to establish a national uniform standard in this area, noting that "credit reporting and credit granting are, in many aspects, national in scope, and that a single set of Federal rules promotes operational efficiency for industry, and competitive prices for consumers."[74]

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between a branch or department of the financial institution, but not between correspondent financial institutions, a holding company and its subsidiaries or between subsidiaries of a holding company without becoming a consumer reporting agency. *See* Federal Trade Commission, Questions and Answers About the Fair Credit Reporting Act, at Qs and As Nos. 16-17, reprinted in 6 Consumer Cred. Guide (CCH) ¶ 26,703 at 63,955 (May 24, 1971).

[73] Affiliate information sharing provisions of bills introduced in prior Congresses limited Federal preemption either by preserving state laws in effect on the date of proposed enactment or by preempting only state information sharing statutes. *See e.g.*, Consumer Reporting Reform Act of 1994, H. Rep. No. 103–486, at 2 (amending FCRA § 624, 15 U.S.C. 1681t).

[74] S. Rep. No. 104–185, at 55 (1995) (accompanying S. 650) [hereinafter "1995 Senate Report"]. The need for Federal preemption was reiterated in the floor debate by Senator Bond, who stated that the uniform federal standards "will reduce the burdens on the credit industry from having to comply with a variety of different State requirements." 141 Cong. Rec. S5450 (daily ed. Apr. 6, 1995). Earlier amendments to the FCRA, proposed by the House, were described as a "compromise" between establishing a uniform national standard and allowing states to enact laws stricter than the FCRA. 140 Cong. Rec. H4355, H4365-66 (daily ed. June 13, 1994) (statement of Rep. McCandless); see H.R. 1015, 103d Cong., 2d Sess. §§ 101-625 (1994). However, in the final legislation, Congress decided that for the next eight years, the FCRA would be "the law of the land" and afterwards, states may enact more stringent

The McCarran-Ferguson Act. Section 2(b) of the Act shields a State law from Federal preemption if the purpose of the State law is to regulate the business of insurance and the conflicting Federal law does not "specifically relate" to the business of insurance.[75] These key terms were analyzed by the Supreme Court in Barnett.[76] The Court initially noted that the word "relates" is "highly general" and has a "broad common-sense meaning."[77] More importantly, the Court found the word "specifically" to mean "explicitly."[78] In focusing on these terms, the Court observed that:

> [T]he Act does not seek to insulate state insurance regulation from the reach of all federal law. Rather, it seeks to protect state regulation primarily against inadvertent federal intrusion—say, through enactment of a federal statute that describes an affected activity in

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legislation. The FCRA amendments preserve this compromise by establishing a "sunset" provision—the special federal preemption provisions will not apply to any provision of state law enacted after January 1, 2004 that (i) gives greater protection to consumers than the FCRA provides and (ii) explicitly states that the provision is intended to supplement the FCRA. See 15 U.S.C. § 1681t(d)(2) (added by EGRPRA tit. II, subtit. D, ch. 1, § 2419(2), 110 Stat. 3009-452 to 3009-453 (1996)); 1995 Senate Report, supra, at 55.

[75] Section 2 of the Act provides:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance * * *.

15 U.S.C. 1012.

[76] *See* Barnett, 517 U.S. at 38.

[77] *Id.*

[78] *Id.*

broad, general terms, of which the insurance business happens to constitute one part.[79]

According to the Court, the McCarran-Ferguson Act does not require the federal statute to relate predominantly to insurance; a statute may relate to more than one thing.[80] These observations illustrate the importance the Court places on specific, explicit references to insurance in the federal legislation.[81] In Barnett, the Court determined that a federal statute authorizing national banks' insurance powers, which used the word "insurance" five times, "specifically related" to the business of insurance.[82]

The affiliate information sharing provisions of the FCRA "relate" to the business of insurance and do so "specifically." The FCRA mentions "insurance" at least twenty-seven times. These references concern core provisions of the FCRA. For example, the FCRA defines "consumer report" expressly to include certain consumer information collected by a consumer reporting agency that is expected to be used "in connection with the underwriting of insurance involving the consumer * * * "[83] The FCRA amendments also expand the

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[79] *Id.* at 39.

[80] *Id.* at 41. For example, the Court in Barnett recognized a statute may relate to banking and insurance. Likewise, the FCRA relates to consumer reporting agencies and insurance.

[81] As recognized by the Court, these types of references "will call the proposed legislation to the attention of interested parties" and should guarantee that Congress has focused on the legislation's "insurance-related effects."

[82] *Id.* at 39.

[83] 15 U.S.C. §§ 1681a(d)(1), 1681b(a)(3)(C) (emphasis added). The affiliate information sharing provisions enacted in 1996 specifically provide that when this type of information is shared between affiliated entities, it does not constitute a "consumer report," and thus can be shared between affiliates, subject to specified procedures. See 15 U.S.C. § 1681a(d)(2)(A)(ii).

list of permissible purposes for furnishing a consumer report to include "credit or insurance transactions that are not initiated by the consumer"—i.e., prescreening potential customers for marketing credit or insurance products.[84] Congress's definition of "firm offer of credit or insurance" also extends the current definition of "firm offer of credit" to include insurance for prescreening purposes.[85]

These specific references to insurance unambiguously demonstrate that Congress purposefully considered the effect of the FCRA amendments on insurance activities and did not merely enact a broad, general law that inadvertently affects insurance. A plain understanding of the FCRA, under the standards set forth by the Supreme Court in Barnett, results in a conclusion that the FCRA "specifically relates" to insurance.

Moreover, it is questionable whether the West Virginia provision passes the threshold of the first clause of section 2(b) of the McCarran-Ferguson Act, i.e., whether the State law was "enacted * * * for the purpose of regulating the business of insurance * * *"[86]

The Supreme Court's analysis of this question has focused consistently on the impact of the State law on the relationship between the insured and the insurer.[87] Section 13 addresses a

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[84] 15 U.S.C. § 1681b(c) (added by EGRPRA tit. II, subtit. D, ch. 1, § 2404, 110 Stat. 3009-431 (1996)).

[85] *Id.* § 1681a(l) (added by EGRPRA tit. II, subtit. D, ch. 1, § 2402(b), 110 Stat. 3009–427 (1996) (emphasis added)).

[86] *Id.* § 1012(b).

[87] *See e.g.*, *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 457 (1969) (focus of the business of insurance is on the relationship between the insurance company and the policyholder and State law enacted to protect the interests of insurance company shareholders was not protected from preemption by McCarran-Ferguson); *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 39 (1996) (relation of insured to insurer and the spreading of risk are matters at the core of the McCarran-Ferguson

different relationship—the relationship between a financial institution and its customer. The West Virginia provision seeks to limit a financial institution's ability to use insurance information gathered in the course of a lending transaction for the purpose of soliciting or offering insurance.[88] In this sense, the provision seeks to protect borrowers from the intrusion of unauthorized insurance solicitations by financial institutions and their subsidiaries; it does not offer any protection to policyholders. State laws that relate to insurance but regulate an activity outside the relationship between the insured and the insurer are not laws enacted for the purpose of regulating the business of insurance for purposes of McCarran-Ferguson.[89] The Supreme Court made clear that to the extent a law is designed to further the interests of parties other than policyholders, it is not a law enacted for the purpose of regulating the business of insurance.[90]

The FCRA amendments thus permit a national bank and its affiliates, including insurance agency affiliates, to share and

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Act's concern); *U.S. Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 503-04 (1993) (performance of an insurance contract is central to the relationship between insurer and insured and therefore within the business of insurance).

[88] Likewise, section 13 limits the activities of financial institutions even where there is no insurance policy. The law could prohibit a financial institution from using information that a borrower did not have any insurance to solicit or offer insurance.

[89] See *Autry* v. *Northwest Premium Services, Inc.*, 144 F.3d 1037, 1044 (7th Cir. 1998) (state statute regulating premium financing for the purchase of automobile insurance served to protect the interests of borrowers and was not a law enacted for the purpose of regulating the business of insurance); *Owensboro Nat'l Bank* v. *Stephens*, 44 F.3d 388, 392 (6th Cir. 1994), cert. denied, 517 U.S. 1119 (1996) (state statute that excluded financial institutions from certain insurance sales activities sought to regulate the conduct of the financial institutions and was not a law enacted for the purpose of regulating the business of insurance).

[90] Fabe, 508 U.S. at 508.

use experience information, including claims information, without any limitation and to share and use any other information, including medical information,[91] pursuant to the notice and opt-out requirements.[92] National banks and their affiliates may engage in these activities even if State laws restrict or otherwise limit such activities because the FCRA amendments expressly preempt any State law requirement or prohibition "with respect to" exchange of information between affiliated entities. Accordingly, we conclude that sections 13(b) and 13(c) of the West Virginia statute are preempted.

Section 14—Physical Location of Insurance Sales

Section 14 generally provides that the place of solicitation or sale of an insurance product by a financial institution must be clearly signed so as to be separate and distinct from the institution's lending and deposit-taking activities. The state law permits institutions with small physical facilities to seek a

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[91] Medical information may, however, be subject to the restrictions on information sharing imposed by the Health Insurance Portability Act of 1996. The Department of Health and Human Services has implemented information sharing provisions of this statute in its rule captioned "Standards for Privacy of Individually Identifiable Health Information." *See* 65 FR 82462 (December 28, 2000). This final rule, which took effect on April 14, 2001, is codified at 45 CFR Parts 160 and 164. Among other things, it covers electronic billing and fund transfers that include individually identifiable health information.

[92] Although the GLBA amended certain provisions of the FCRA relating to regulatory authority, nothing in GLBA, including the privacy provisions in Title V of that statute, alters the conclusion concerning the FCRA provisions on the sharing of information between affiliates or the preemptive effect of the FCRA. GLBA § 506(c) expressly provides that "nothing in this title shall be construed to modify, limit, or supersede the operation of the Fair Credit Reporting Act * * *" 15 U.S.C. 6806.

waiver from the state insurance commissioner if they do not have the physical space to comply with this provision.[93]

None of the Safe Harbors protect State provisions restricting the physical location where insurance sales take place, or requiring that insurance sales be physically separated from lending and deposit-taking activities.

The text of the West Virginia provision creates some ambiguity about whether signage distinguishing the insurance sales area from the lending and deposit taking areas would be sufficient to comply with the statute, or whether physical segregation of these activities is required. The language in the provision suggests that physical separation is required because the requirement to use signage must be done in a manner so the locations are readily distinguishable by the public as separate and distinct. The waiver for small institutions also speaks in terms of not having the physical space to comply—a condition that should not be relevant if all that is required is signage. The West Virginia Insurance Department also has suggested in informal discussions that this provision would require physical segregation.

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[93] Specifically, section 14 of the West Virginia Act provides that:

> The place of solicitation or sale of insurance by any financial institution or on the premises of any financial institution shall be clearly and conspicuously signed so as to be readily distinguishable by the public as separate and distinct from the financial institution's lending and deposit-taking activities. In the event that a person which would otherwise be subject to the requirements set forth in this provision does not have the physical space to so comply, the commissioner may grant a waiver of the requirements of this section upon a written request by such person demonstrating that, due to its small physical facilities, compliance is not possible, and including identification of other steps which will be taken to minimize customer confusion.

W. Va. Code § 33–11A–14 (2000).

We therefore assume that section 14 requires the physical separation of insurance from lending and deposit-taking activities. Accordingly, in our view, the West Virginia requirement for physical segregation of insurance sales from lending and deposittaking is preempted under the *Barnett* standards.

In most banks, the deposit-taking area generally encompasses teller windows and teller lines. These spaces, which are different from the types of physical settings used in many other kinds of business offices, tend to be in a discrete area, characterized by a fairly quick movement through of customers. Both lending and insurance sales, on the other hand, are often done from desks in spaces apart from the teller services where the customer can speak with a representative for a longer time to discuss the transaction.

The requirement to separate lending and deposit-taking activities from insurance sales affects the banks' insurance sales efforts significantly. Many banks, both large and small, are developing ways to streamline their delivery systems, for example, by the use of more compact physical facilities and a greater reliance on technology. At the same time, banks are striving to increase convenience and product choices to consumers.[94] A restriction on the physical location of insurance activities would require the bank to devote more physical space to all three types of activities than is otherwise necessary, raising costs at bank facilities. Similar to the effect of the requirement in section 6 for a separate insurance sales force, this requirement in section 14 substantively intrudes into and disrupts bank operations by effectively prohibiting a bank from conducting all three activities without incurring substantial, unnecessary costs to reconfigure its physical

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[94] From a consumer's standpoint, the OCC has noted, the convenience and ease of using a streamlined facility diminishes if the facility cannot offer the full panoply of services available at a traditional brick and mortar facility.

space. Higher costs will impede the bank's ability to offer insurance products and reduce the availability of those products to consumers.

The Federal insurance consumer protection statute and regulations avoid this result by requiring that the routine acceptance of deposits is kept, *to the extent practicable,* physically segregated from insurance product activity.[95] In order to comply with Federal law, national banks must separate only deposit-taking from insurance sales, and only to the extent practicable.

The West Virginia statute permits the Commissioner to grant a waiver from the physical segregation requirement upon written request. However, the request must demonstrate that "compliance is not possible," and must identify the steps the bank will take to "minimize customer confusion." As we have said in our discussion of section 6 of the West Virginia statute, a state-administered waiver provision does not erase the conflict between the state provision and Federal law. Under the Barnett standards, a state may not condition a national bank's exercise of a Federally authorized power unless a Federal statute directs that result. Here, the State law imposes requirements that are expensive, disruptive of ongoing bank operations, and, in some cases, impossible to implement. Accordingly, section 14 of the West Virginia statute is preempted.

We trust the conclusions expressed in this letter are responsive to the preemption issues you have identified.

Sincerely,

Julie L. Williams,
First Senior Deputy Comptroller and Chief Counsel.

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[95] *See* 12 U.S.C. 1831x(d); 12 CFR 14.50.

Name	License	Port name
Ace Young, Inc	09667	Chicago
Aeromar USA, Inc	06159	Washington, DC
Albuquerque Brokerage Co., Inc	04547	Albuquerque
All Nations Forwarding Import Company, Inc	06589	Miami
Allround CHB, Inc	11854	New York
Apple Import Services Inc	07255	New York
Arthur J Fritz Company	05455	Miami
Arthur J Fritz Company	07646	St. Louis
Arthur J Fritz Company	03160	Honolulu
Arthur J Fritz Company	06951	Boston
Arthur J Fritz Company	06960	Detroit
Arthur J Fritz Company	03763	El Paso
Arthur J Fritz Company	07006	Atlanta
Arthur J Fritz Company	06346	Dallas/Fort Worth
Arthur J Fritz Company	09204	Philadelphia
Arthur J Fritz Company	03492	Portland, ME
Arthur J Fritz Company Of Hawaii, Inc	03520	Honolulu
Arthur J Fritz Company of Los Angeles	03205	Los Angeles
Arthur J Fritz Company, Inc	03501	New Orleans
Arthur J Fritz Company, Inc	07362	Charleston
Arthur J Fritz Company, Inc	07203	Cleveland
Associated Customhouse Brokers	06041	Buffalo
Autair Customhouse Broker, Inc	15120	Miami
Bar-Zel Expediters Inc	04436	New York
Barinco International Corporation	07692	San Francisco
BBC International	05051	San Francisco
Becnel, Gerard	06333	New Orleans
Becnel, Gerard A	09064	New Orleans

APPENDIX E

GRAMM-LEACH-BLILEY ACT

SEC. 104. OPERATION OF STATE LAW

(a) STATE REGULATION OF THE BUSINESS OF INSURANCE.—The Act entitled "An Act to express the intent of Congress with reference to the regulation of the business of insurance" and approved March 9, 1945 (15 U.S.C. 1011 *et seq.*) (commonly referred to as the "McCarran-Ferguson Act") remains the law of the United States.

(b) MANDATORY INSURANCE LICENSING REQUIREMENTS.—No person shall engage in the business of insurance in a State as principal or agent unless such person is licensed as required by the appropriate insurance regulator of such State in accordance with the relevant State insurance law, subject to subsections (c), (d), and (e).

(c) AFFILIATIONS.—

(1) IN GENERAL.—Except as provided in paragraph (2), no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution, or an affiliate thereof, from being affiliated directly or indirectly or associated with any person, as authorized or permitted by this Act or any other provision of Federal law.

(2) INSURANCE.--With respect to affiliations between depository institutions, or any affiliate thereof, and any insurer, paragraph (1) does not prohibit—

(A) any State from—

(i) collecting, reviewing, and taking actions (including approval and disapproval) on applications and other documents or reports concerning any proposed acquisition of, or a change or continuation of control of, an insurer domiciled in that State; and

(ii) exercising authority granted under applicable State law to collect information concerning any proposed acquisition of, or a change or continuation of control of, an insurer engaged in the business of insurance in, and regulated as an insurer by, such State; during the 60-day period preceding the effective date of the acquisition or change or continuation of control, so long as the collecting, reviewing, taking actions, or exercising authority by the State does not have the effect of discriminating, intentionally or unintentionally, against a depository institution or an affiliate thereof, or against any other person based upon an association of such person with a depository institution;

(B) any State from requiring any person that is acquiring control of an insurer domiciled in that State to maintain or restore the capital requirements of that insurer to the level required under the capital regulations of general applicability in that State to avoid the requirement of preparing and filing with the insurance regulatory authority of that State a plan to increase the capital of the insurer, except that any determination by the State insurance regulatory authority with respect to such requirement shall be made not later than 60 days after the date of notification under subparagraph (A); or

(C) any State from restricting a change in the ownership of stock in an insurer, or a company formed for the purpose of controlling such insurer, after the conversion of the insurer from mutual to stock form so long as such restriction does not have the effect of discriminating, intentionally or unintentionally, against a depository institution or an affiliate thereof, or against any other person based upon an association of such person with a depository institution.

(d) ACTIVITIES.—

(1) IN GENERAL.—Except as provided in paragraph (3), and except with respect to insurance sales, solicitation, and cross marketing activities, which shall be governed by paragraph (2), no State may, by statute, regulation, order, interpretation, or other action, prevent or restrict a depository institution or an affiliate thereof from engaging directly or indirectly, either by itself or in conjunction with an affiliate, or any other person, in any activity authorized or permitted under this Act and the amendments made by this Act.

(2) INSURANCE SALES.—

(A) IN GENERAL.—In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or cross-marketing activity.

(B) CERTAIN STATE LAWS PRESERVED.—Notwithstanding subparagraph (A), a State may impose any of the following restrictions, or restrictions that are substantially the same as but no more burdensome or restrictive than those in each of the following clauses:

(i) Restrictions prohibiting the rejection of an insurance policy by a depository institution or an affiliate of a depository institution, solely because the policy has been issued or underwritten by any person who is not associated with such depository institution or affiliate when the insurance is required in connection with a loan or extension of credit.

(ii) Restrictions prohibiting a requirement for any debtor, insurer, or insurance agent or broker to pay a separate charge in connection with the handling of insurance that is required in connection with a loan or other extension of credit or the provision of another traditional banking product by an depository institution, or any affiliate of a depository institution, unless such charge would be required when the depository institution or affiliate is the licensed insurance agent or broker providing the insurance.

(iii) Restrictions prohibiting the use of any advertisement or other insurance promotional material by a depository institution or any affiliate of a depository institution that would cause a reasonable person to believe mistakenly that—

(I) the Federal Government or a State is responsible for the insurance sales activities of, or stands behind the credit of, the institution or affiliate; or

(II) a State, or the Federal Government guarantees any returns on insurance products, or is a source of payment on any insurance obligation of or sold by the institution or affiliate;

(iv) Restrictions prohibiting the payment or receipt of any commission or brokerage fee or other valuable consideration for services as an insurance agent or broker to or by any person, unless such person holds a valid State license regarding the applicable class of insurance at the time at which the services are performed, except that, in this clause, the term "services as an insurance agent or broker" does not include a referral by an unlicensed person of a customer or potential customer to a licensed insurance agent or broker that does not include a discussion of specific insurance policy terms and conditions.

(v) Restrictions prohibiting any compensation paid to or received by any individual who is not licensed to

sell insurance, for the referral of a customer that seeks to purchase, or seeks an opinion or advice on, any insurance product to a person that sells or provides opinions or advice on such product, based on the purchase of insurance by the customer.

(vi) Restrictions prohibiting the release of the insurance information of a customer (defined as information concerning the premiums, terms, and conditions of insurance coverage, including expiration dates and rates, and insurance claims of a customer contained in the records of the depository institution or an affiliate thereof) to any person other than an officer, director, employee, agent, or affiliate of a depository institution, for the purpose of soliciting or selling insurance, without the express consent of the customer, other than a provision that prohibits—

(I) a transfer of insurance information to an unaffiliated insurer in connection with transferring insurance in force on existing insureds of the depository institution or an affiliate thereof, or in connection with a merger with or acquisition of an unaffiliated insurer; or

(II) the release of information as otherwise authorized by State or Federal law.

(vii) Restrictions prohibiting the use of health information obtained from the insurance records of a customer for any purpose, other than for its activities as a licensed agent or broker, without the express consent of the customer.

(viii) Restrictions prohibiting the extension of credit or any product or service that is equivalent to an extension of credit, lease or sale of property of any kind, or furnishing of any services or fixing or varying the consideration for any of the foregoing, on the condition or requirement that the customer obtain insurance from a depository institution or an affiliate of a depository institution, or a particular insurer,

agent, or broker, other than a prohibition that would prevent any such depository institution or affiliate—

(I) from engaging in any activity described in this clause that would not violate section 106 of the Bank Holding Company Act Amendments of 1970, as interpreted by the Board of Governors of the Federal Reserve System; or

(II) from informing a customer or prospective customer that insurance is required in order to obtain a loan or credit, that loan or credit approval is contingent upon the procurement by the customer of acceptable insurance, or that insurance is available from the depository institution or an affiliate of the depository institution.

(ix) Restrictions requiring, when an application by a consumer for a loan or other extension of credit from a depository institution is pending, and insurance is offered or sold to the consumer or is required in connection with the loan or extension of credit by the depository institution or any affiliate thereof, that a written disclosure be provided to the consumer or prospective customer indicating that the customer's choice of an insurance provider will not affect the credit decision or credit terms in any way, except that the depository institution may impose reasonable requirements concerning the creditworthiness of the insurer and scope of coverage chosen.

(x) Restrictions requiring clear and conspicuous disclosure, in writing, where practicable, to the customer prior to the sale of any insurance policy that such policy—

(I) is not a deposit;

(II) is not insured by the Federal Deposit Insurance Corporation;

(III) is not guaranteed by any depository institution or, if appropriate, an affiliate of any such

institution or any person soliciting the purchase of or selling insurance on the premises thereof; and

(IV) where appropriate, involves investment risk, including potential loss of principal.

(xi) Restrictions requiring that, when a customer obtains insurance (other than credit insurance or flood insurance) and credit from a depository institution, or any affiliate of such institution, or any person soliciting the purchase of or selling insurance on the premises thereof, the credit and insurance transactions be completed through separate documents.

(xii) Restrictions prohibiting, when a customer obtains insurance (other than credit insurance or flood insurance) and credit from a depository institution or an affiliate of such institution, or any person soliciting the purchase of or selling insurance on the premises thereof, inclusion of the expense of insurance premiums in the primary credit transaction without the express written consent of the customer.

(xiii) Restrictions requiring maintenance of separate and distinct books and records relating to insurance transactions, including all files relating to and reflecting consumer complaints, and requiring that such insurance books and records be made available to the appropriate State insurance regulator for inspection upon reasonable notice.

(C) LIMITATIONS.—

(i) OCC DEFERENCE.—Section 304(e) does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued, adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B).

(ii) NONDISCRIMINATION.—Subsection (e) does not apply with respect to any State statute, regulation, order, interpretation, or other action regarding insurance sales, solicitation, or cross marketing activities described in subparagraph (A) that was issued, adopted, or enacted before September 3, 1998, and that is not described in subparagraph (B).

(iii) CONSTRUCTION.—Nothing in this paragraph shall be construed—

(I) to limit the applicability of the decision of the Supreme Court in Barnett Bank of Marion County N.A. v. Nelson, 517 U.S. 25 (1996) with respect to any State statute, regulation, order, interpretation, or other action that is not referred to or described in subparagraph (B); or

(II) to create any inference with respect to any State statute, regulation, order, interpretation, or other action that is not described in this paragraph.

(3) INSURANCE ACTIVITIES OTHER THAN SALES.—State statutes, regulations, interpretations, orders, and other actions shall not be preempted under paragraph (1) to the extent that they—

(A) relate to, or are issued, adopted, or enacted for the purpose of regulating the business of insurance in accordance with the Act entitled "An Act to express the intent of Congress with reference to the regulation of the business of insurance" and approved March 9, 1945 (15 U.S.C. 1011 et seq.) (commonly referred to as the "McCarran-Ferguson Act");

(B) apply only to persons that are not depository institutions, but that are directly engaged in the business of insurance (except that they may apply to depository institutions engaged in providing savings bank life insurance as principal to the extent of regulating such insurance);

(C) do not relate to or directly or indirectly regulate insurance sales, solicitations, or cross marketing activities; and

(D) are not prohibited under subsection (e).

(4) FINANCIAL ACTIVITIES OTHER THAN INSURANCE.—No State statute, regulation, order, interpretation, or other action shall be preempted under paragraph (1) to the extent that—

(A) it does not relate to, and is not issued and adopted, or enacted for the purpose of regulating, directly or indirectly, insurance sales, solicitations, or cross marketing activities covered under paragraph (2);

(B) it does not relate to, and is not issued and adopted, or enacted for the purpose of regulating, directly or indirectly, the business of insurance activities other than sales, solicitations, or cross marketing activities, covered under paragraph (3);

(C) it does not relate to securities investigations or enforcement actions referred to in subsection (f); and

(D) it—

(i) does not distinguish by its terms between depository institutions, and affiliates thereof, engaged in the activity at issue and other persons engaged in the same activity in a manner that is in any way adverse with respect to the conduct of the activity by any such depository institution or affiliate engaged in the activity at issue;

(ii) as interpreted or applied, does not have, and will not have, an impact on depository institutions, or affiliates thereof, engaged in the activity at issue, or any person who has an association with any such depository institution or affiliate, that is substantially more adverse than its impact on other persons engaged in the same activity that are not depository institutions or affiliates thereof, or persons

who do not have an association with any such depository institution or affiliate;

(iii) does not effectively prevent a depository institution or affiliate thereof from engaging in activities authorized or permitted by this Act or any other provision of Federal law; and

(iv) does not conflict with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal law.

(e) NONDISCRIMINATION.—Except as provided in any restrictions described in subsection (d)(2)(B), no State may, by statute, regulation, order, interpretation, or other action, regulate the insurance activities authorized or permitted under this Act or any other provision of Federal law of a depository institution, or affiliate thereof, to the extent that such statute, regulation, order, interpretation, or other action—

(1) distinguishes by its terms between depository institutions, or affiliates thereof, and other persons engaged in such activities, in a manner that is in any way adverse to any such depository institution, or affiliate thereof;

(2) as interpreted or applied, has or will have an impact on depository institutions, or affiliates thereof, that is substantially more adverse than its impact on other persons providing the same products or services or engaged in the same activities that are not depository institutions, or affiliates thereof, or persons or entities affiliated therewith;

(3) effectively prevents a depository institution, or affiliate thereof, from engaging in insurance activities authorized or permitted by this Act or any other provision of Federal law; or

(4) conflicts with the intent of this Act generally to permit affiliations that are authorized or permitted by Federal

law between depository institutions, or affiliates thereof, and persons engaged in the business of insurance.

(f) LIMITATION.—Subsections (c) and (d) shall not be construed to affect—

(1) the jurisdiction of the securities commission (or any agency or office performing like functions) of any State, under the laws of such State—

(A) to investigate and bring enforcement actions, consistent with section 18(c) of the Securities Act of 1933, with respect to fraud or deceit or unlawful conduct by any person, in connection with securities or securities transactions; or

(B) to require the registration of securities or the licensure or registration of brokers, dealers, or investment advisers (consistent with section 203A of the Investment Advisers Act of 1940), or the associated persons of a broker, dealer, or investment adviser (consistent with such section 203A); or

(2) State laws, regulations, orders, interpretations, or other actions of general applicability relating to the governance of corporations, partnerships, limited liability companies, or other business associations incorporated or formed under the laws of that State or domiciled in that State, or the applicability of the antitrust laws of any State or any State law that is similar to the antitrust laws if such laws, regulations, orders, interpretations, or other actions are not inconsistent with the purposes of this Act to authorize or permit certain affiliations and to remove barriers to such affiliations.

(g) DEFINITIONS.—For purposes of this section, the following definitions shall apply:

(1) AFFILIATE.—The term "affiliate" means any company that controls, is controlled by, or is under common control with another company.

(2) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given the term in subsection (a) of the first section of the Clayton Act, and includes section 5 of the Federal Trade Commission Act (to the extent that such section 5 relates to unfair methods of competition).

(3) DEPOSITORY INSTITUTION.—The term "depository institution"—

(A) has the meaning given the term in section 3 of the Federal Deposit Insurance Act; and

(B) includes any foreign bank that maintains a branch, agency, or commercial lending company in the United States.

(4) INSURER.—The term "insurer" means any person engaged in the business of insurance.

(5) STATE.—The term "State" means any State of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, the Virgin Islands, and the Northern Mariana Islands.

GRAMM-LEACH-BLILEY ACT

SEC. 301. FUNCTIONAL REGULATION OF INSURANCE

The insurance activities of any person (including a national bank exercising its power to act as agent under the eleventh undesignated paragraph of section 13 of the Federal Reserve Act) shall be functionally regulated by the States, subject to section 104.

GRAMM-LEACH-BLILEY ACT

SEC. 305. INSURANCE CUSTOMER PROTECTIONS

The Federal Deposit Insurance Act (12 U.S.C. 1811 *et seq.*) is amended by inserting after section 46, as added by section 121(d) of this Act, the following new section:

"SEC. 47. INSURANCE CUSTOMER PROTECTIONS.

"(a) REGULATIONS REQUIRED.—

"(1) IN GENERAL.—The Federal banking agencies shall prescribe and publish in final form, before the end of the 1-year period beginning on the date of the enactment of the Gramm-Leach-Bliley Act, customer protection regulations (which the agencies jointly determine to be appropriate) that—

"(A) apply to retail sales practices, solicitations, advertising, or offers of any insurance product by any depository institution or any person that is engaged in such activities at an office of the institution or on behalf of the institution; and

"(B) are consistent with the requirements of this Act and provide such additional protections for customers to whom such sales, solicitations, advertising, or offers are directed.

"(2) APPLICABILITY TO SUBSIDIARIES.—The regulations prescribed pursuant to paragraph (1) shall extend such protections to any subsidiary of a depository institution, as deemed appropriate by the regulators referred to in paragraph (3), where such extension is determined to be necessary to ensure the consumer protections provided by this section.

"(3) CONSULTATION AND JOINT REGULATIONS.—The Federal banking agencies shall consult with each other and prescribe joint regulations pursuant to

paragraph (1), after consultation with the State insurance regulators, as appropriate.

"(b) SALES PRACTICES.—The regulations prescribed pursuant to subsection (a) shall include anti-tying and anti-coercion rules applicable to the sale of insurance products that prohibit a depository institution from engaging in any practice that would lead a customer to believe an extension of credit, in violation of section 106(b) of the Bank Holding Company Act Amendments of 1970, is conditional upon—

"(1) the purchase of an insurance product from the institution or any of its affiliates; or

"(2) an agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product from an unaffiliated entity.

"(c) DISCLOSURES AND ADVERTISING.—The regulations prescribed pursuant to subsection (a) shall include the following provisions relating to disclosures and advertising in connection with the initial purchase of an insurance product:

"(1) DISCLOSURES.—

"(A) IN GENERAL.—Requirements that the following disclosures be made orally and in writing before the completion of the initial sale and, in the case of clause (iii), at the time of application for an extension of credit:

"(i) UNINSURED STATUS.—As appropriate, the product is not insured by the Federal Deposit Insurance Corporation, the United States Government, or the depository institution.

"(ii) INVESTMENT RISK.—In the case of a variable annuity or other insurance product which involves an investment risk, that there is an investment risk associated with the product, including possible loss of value.

"(iii) COERCION.—The approval of an extension of credit may not be conditioned on—

"(I) the purchase of an insurance product from the institution in which the application for credit is pending or any of affiliate of the institution; or

"(II) an agreement by the consumer not to obtain, or a prohibition on the consumer from obtaining, an insurance product from an unaffiliated entity.

"(B) MAKING DISCLOSURE READILY UNDERSTANDABLE.—Regulations prescribed under subparagraph (A) shall encourage the use of disclosure that is conspicuous, simple, direct, and readily understandable, such as the following:

"(i) 'NOT FDIC—INSURED'.

"(ii) 'NOT GUARANTEED BY THE BANK'.

"(iii) 'MAY GO DOWN IN VALUE'.

"(iv) 'NOT INSURED BY ANY GOVERNMENT AGENCY'.

"(C) LIMITATION.—Nothing in this paragraph requires the inclusion of the foregoing disclosures in advertisements of a general nature describing or listing the services or products offered by an institution.

"(D) MEANINGFUL DISCLOSURES.—Disclosures shall not be considered to be meaningfully provided under this paragraph if the institution or its representative states that disclosures required by this subsection were available to the customer in printed material available for distribution, where such printed material is not provided and such information is not orally disclosed to the customer.

"(E) ADJUSTMENTS FOR ALTERNATIVE METHODS OF PURCHASE.—In prescribing the requirements under subparagraphs (A) and (F), necessary

adjustments shall be made for purchase in person, by telephone, or by electronic media to provide for the most appropriate and complete form of disclosure and acknowledgments.

"(F) CONSUMER ACKNOWLEDGMENT.—A requirement that a depository institution shall require any person selling an insurance product at any office of, or on behalf of, the institution to obtain, at the time a consumer receives the disclosures required under this paragraph or at the time of the initial purchase by the consumer of such product, an acknowledgment by such consumer of the receipt of the disclosure required under this subsection with respect to such product.

"(2) PROHIBITION ON MISREPRESENTATIONS.—A prohibition on any practice, or any advertising, at any office of, or on behalf of, the depository institution, or any subsidiary, as appropriate, that could mislead any person or otherwise cause a reasonable person to reach an erroneous belief with respect to—

"(A) the uninsured nature of any insurance product sold, or offered for sale, by the institution or any subsidiary of the institution;

"(B) in the case of a variable annuity or insurance product that involves an investment risk, the investment risk associated with any such product; or

"(C) in the case of an institution or subsidiary at which insurance products are sold or offered for sale, the fact that—

"(i) the approval of an extension of credit to a customer by the institution or subsidiary may not be conditioned on the purchase of an insurance product by such customer from the institution or subsidiary; and

"(ii) the customer is free to purchase the insurance product from another source.

"(d) SEPARATION OF BANKING AND NONBANKING ACTIVITIES.—

"(1) REGULATIONS REQUIRED.—The regulations prescribed pursuant to subsection (a) shall include such provisions as the Federal banking agencies consider appropriate to ensure that the routine acceptance of deposits is kept, to the extent practicable, physically segregated from insurance product activity.

"(2) REQUIREMENTS.—Regulations prescribed pursuant to paragraph (1) shall include the following requirements:

"(A) SEPARATE SETTING.—A clear delineation of the setting in which, and the circumstances under which, transactions involving insurance products should be conducted in a location physically segregated from an area where retail deposits are routinely accepted.

"(B) REFERRALS.—Standards that permit any person accepting deposits from the public in an area where such transactions are routinely conducted in a depository institution to refer a customer who seeks to purchase any insurance product to a qualified person who sells such product, only if the person making the referral receives no more than a one-time nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a transaction.

"(C) QUALIFICATION AND LICENSING REQUIREMENTS.—Standards prohibiting any depository institution from permitting any person to sell or offer for sale any insurance product in any part of any office of the institution, or on behalf of the institution, unless such person is appropriately qualified and licensed.

"(e) DOMESTIC VIOLENCE DISCRIMINATION PROHIBITION.—

"(1) IN GENERAL.—In the case of an applicant for, or an insured under, any insurance product described in paragraph (2), the status of the applicant or insured as a victim of domestic violence, or as a provider of services to victims of domestic violence, shall not be considered as a criterion in any decision with regard to insurance underwriting, pricing, renewal, or scope of coverage of insurance policies, or payment of insurance claims, except as required or expressly permitted under State law.

"(2) SCOPE OF APPLICATION.—The prohibition contained in paragraph (1) shall apply to any life or health insurance product which is sold or offered for sale, as principal, agent, or broker, by any depository institution or any person who is engaged in such activities at an office of the institution or on behalf of the institution.

"(3) DOMESTIC VIOLENCE DEFINED.—For purposes of this subsection, the term 'domestic violence' means the occurrence of one or more of the following acts by a current or former family member, household member, intimate partner, or caretaker:

"(A) Attempting to cause or causing or threatening another person physical harm, severe emotional distress, psychological trauma, rape, or sexual assault.

"(B) Engaging in a course of conduct or repeatedly committing acts toward another person, including following the person without proper authority, under circumstances that place the person in reasonable fear of bodily injury or physical harm.

"(C) Subjecting another person to false imprisonment.

"(D) Attempting to cause or cause damage to property so as to intimidate or attempt to control the behavior of another person.

"(f) CONSUMER GRIEVANCE PROCESS.—The Federal banking agencies shall jointly establish a consumer complaint mechanism, for receiving and expeditiously addressing consumer complaints alleging a violation of regulations issued under the section, which shall—

"(1) establish a group within each regulatory agency to receive such complaints;

"(2) develop procedures for investigating such complaints;

"(3) develop procedures for informing consumers of rights they may have in connection with such complaints; and

"(4) develop procedures for addressing concerns raised by such complaints, as appropriate, including procedures for the recovery of losses to the extent appropriate.

"(g) EFFECT ON OTHER AUTHORITY.—

"(1) IN GENERAL.—No provision of this section shall be construed as granting, limiting, or otherwise affecting—

"(A) any authority of the Securities and Exchange Commission, any self-regulatory organization, the Municipal Securities Rulemaking Board, or the Secretary of the Treasury under any Federal securities law; or

"(B) except as provided in paragraph (2), any authority of any State insurance commission (or any agency or office performing like functions), or of any State securities commission (or any agency or office performing like functions), or other State authority under any State law.

"(2) COORDINATION WITH STATE LAW.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), insurance customer protection regulations prescribed by a Federal banking agency under this section shall not apply to retail sales, solicitations, advertising, or offers of any insurance product by any depository institution or to any person who is engaged in such activities at an office of such institution or on behalf of the institution, in a State where the State has in effect statutes, regulations, orders, or interpretations, that are inconsistent with or contrary to the regulations prescribed by the Federal banking agencies.

"(B) PREEMPTION.—

"(i) IN GENERAL.—If, with respect to any provision of the regulations prescribed under this section, the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Board of Directors of the Corporation determine jointly that the protection afforded by such provision for customers is greater than the protection provided by a comparable provision of the statutes, regulations, orders, or interpretations referred to in subparagraph (A) of any State, the appropriate State regulatory authority shall be notified of such determination in writing.

"(ii) CONSIDERATIONS.—Before making a final determination under clause (i), the Federal agencies referred to in clause

(i) shall give appropriate consideration to comments submitted by the appropriate State regulatory authorities relating to the level of protection afforded to consumers under State law.

"(iii) FEDERAL PREEMPTION AND ABILITY OF STATES TO OVERRIDE FEDERAL PREEMPTION.—If the Federal agencies referred to in clause (i) jointly determine that any provision of the regulations prescribed

under this section affords greater protections than a comparable State law, rule, regulation, order, or interpretation, those agencies shall send a written preemption notice to the appropriate State regulatory authority to notify the State that the Federal provision will preempt the State provision and will become applicable unless, not later than 3 years after the date of such notice, the State adopts legislation to override such preemption.

"(h) NON-DISCRIMINATION AGAINST NON-AFFILIATED AGENTS.—The Federal banking agencies shall ensure that the regulations prescribed pursuant to subsection (a) shall not have the effect of discriminating, either intentionally or unintentionally, against any person engaged in insurance sales or solicitations that is not affiliated with a depository institution.".

APPENDIX F

WEST VIRGINIA CODE

ARTICLE 11A. INSURANCE SALES CONSUMER PROTECTION ACT.

§33-11A-1. Short title.

This article may be cited as the "Insurance Sales Consumer Protection Act".

§33-11A-3. Definitions.

For the purposes of this article: (a) "Affiliate" means a person that directly or indirectly or through one or more intermediaries, controls or is controlled by another or is under common control with another.

(b) "Commissioner" means the insurance commissioner of West Virginia.

(c) "Financial institution":

(1) Means any bank, savings bank, savings and loan association, trust company, credit union or any other depository institution, which: (i) Accepts federally insured deposits, including, but not limited to, those as defined by the Federal Deposit Insurance Act, as amended, 12 U.S.C. §1813(c)(1); and (ii) makes loans to residents of this state;

(2) Means any employee or agent of a financial institution; and

(3) Means any nondepository affiliate or subsidiary of a financial institution but only in the instances when the nondepository affiliate or subsidiary is soliciting the sale or purchase of insurance recommended or sponsored by, on the premises of, or in connection with a product offering of, the financial institution.

(4) Does not include a credit card bank, as defined in the Bank Holding Company Act of 1956, as amended, 12 U.S.C.

§1841(c)(2)(F), an industrial loan company as defined in 12 U.S.C. §1841(c)(2)(H), a specialized savings association serving certain military personnel as defined in 12 U.S.C. §1467a(m)(3)(F), a bank whose ownership is grandfathered under the Competitive Equality Banking Act of 1987 as codified at 12 U.S.C. §1843(f)(1), or an insurance company.

(d) "Insurance" means all products defined or regulated as insurance by the state of West Virginia, except:

(1) Credit life, health and accident, accident, loss of income, or property insurance as described in subsection (b) of section one hundred nine, article three, chapter forty-six-a of the code of West Virginia;

(2) Insurance placed by a financial institution in connection with collateral pledged as security for a loan when the debtor breaches the contractual obligation to provide that insurance; and

(3) Private mortgage insurance.

(e) "Insurance company" means a company that possesses a certificate under this chapter to transact insurance business in West Virginia.

(f) "Insurance information" means copies of insurance policies, or the information contained thereon, binders, rates and expiration dates contained within the information supplied in connection with the loan, which are not otherwise available to the financial institution's affiliated broker or agent.

(g) "Person" means any natural person, partnership, corporation, association, business trust, or other form of business enterprise, as the case demands.

§33-11A-6. Insurance sales separate from loan transaction.

(a) Solicitation for the purchase or sale of insurance by a financial institution shall be conducted only by individuals

whose responsibilities do not include loan transactions or other transactions involving the extension of credit: *Provided*, That for a financial institution location having three or less individuals with lending authority, solicitation for the sale of insurance may be conducted by an individual with responsibilities for loan transactions or other transactions involving the extension of credit, as long as the individual primarily responsible for making the specific loan or extension of credit is not the same individual engaged in the solicitation of the purchase or sale of insurance for that same transaction.

(b) In the event that in any small office, the same individual is the licensed agent or broker and the sole individual with lending authority, the commissioner may grant a waiver of the requirements of this section upon a written request. Such request shall include documentation that, due to the small office staff, compliance is not possible, and include identification of other steps which will be taken to minimize the customer confusion prohibited by this article.

§33-11A-10. Timing of insurance solicitation.

(a) No individual who is an employee or agent of a financial institution, or of a subsidiary or affiliate thereof, may, directly or indirectly, make an insurance-related referral to or solicit the purchase of any insurance from a customer knowing that such customer has applied for a loan or extension of credit from that financial institution before such time as the customer has received a written commitment with respect to such loan or extension of credit, or, in the event that no written commitment has or will be issued in connection with the loan or extension of credit, before such time as the customer receives notification of approval of the loan or extension of credit by the financial institution and the financial institution creates a written record of the loan or extension of credit approval.

(b) This provision shall not prohibit any individual subject to subsection (a) above from:

(1) Informing a customer that insurance is required in connection with a loan; or

(2) Contacting persons in the course of direct or mass mailing to a group of persons in a manner that bears no relation to the person's loan application or credit decision.

§33-11A-14. Physical location of insurance sales.

The place of solicitation or sale of insurance by any financial institution or on the premises of any financial institution shall be clearly and conspicuously signed so as to be readily distinguishable by the public as separate and distinct from the financial institution's lending and deposit-taking activities. In the event that a person which would otherwise be subject to the requirements set forth in this provision does not have the physical space to so comply, the commissioner may grant a waiver of the requirements of this section upon a written request by such person demonstrating that, due to its small physical facilities, compliance is not possible, and including identification of other steps which will be taken to minimize customer confusion.

§33-12-25. Termination of authority to represent insurer.

(a) *Termination for cause.*—An insurer or authorized representative of the insurer that terminates the appointment, employment, contract or other insurance business relationship with a producer shall notify the insurance commissioner within thirty days following the effective date of the termination, using a format prescribed by the insurance commissioner, if the reason for termination is one of the reasons set forth in section twenty-four of this article or the insurer has knowledge the producer was found by a court, government body, or self-regulatory organization authorized by law to have engaged in any of the activities in section

twenty-four of this article. Upon the written request of the insurance commissioner, the insurer shall provide additional information, documents, records or other data pertaining to the termination or activity of the producer.

APPENDIX G

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June 30, 2000

Via Federal Express

Communications Division
Office of the Comptroller
of the Currency
250 E Street, S.W.
Washington. D.C. 20219

Re: Docket No. 00-12

Dear Comptroller:

On behalf of the independent Insurance Agents of America ("IIAA"), the National Association of insurance and Financial Advisors ("NAIFA") (formerly "NALU"), and the National Association of Professional Insurance Agents ("PIA") (collectively "insurance Agents"), we submit these comments to assist the Office of the Comptroller of the Currency ("OCC") in its consideration of whether certain provisions of the West Virginia Insurance Sales Consumer Protection Act ("West Virginia Act" or "Act") are preempted by Federal law. IIAA, NATFA and PIA are non-profit trade associations that represent over one million (1,000.000) insurance agents and their employees throughout the United States. Their

members are agents who work at all levels of the insurance market and sell a full range of insurance products, including annuities.

For the reasons explained below, preempting any of the challenged requirements would be both unprecedented and unwarranted. It would be unprecedented because it is clear that the OCC has no. authority to determine whether state insurance regulations like the challenged West Virginia provisions are preempted. It would be unwarranted because—even if the OCC had such authority—it would be inappropriate to exercise it here.

Introduction

The OCC has been asked by the West Virginia Bankers Association ("WVBA") to determine whether Section 104 of the Gramm-Leach-Bliley Act ("GLBA" or "Act") preempts seven specific West Virginia insurance sales consumer protection provisions.[1] An ill-advised OCC preemption opinion issued in response to this request could disrupt regulatory activities in 30 or more States because the insurance sales consumer protection provisions in place in each of those States contain several or more provisions that are substantively identical to the challenged West Virginia Provisions.[2] This is especially troubling because—virtually

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[1] 65 Fed. Reg. 35420, 34521 (June 2, 2000). Section 104 will be codified as 15 U.S.C. § 6801; all references herein will, however, be to the Act itself rather than to the code citation.

[2] Since March of 1996 when the Supreme Court issued its opinion in *Barnett Bank of Marion Co., N.A. v. Nelson*, 517 U.S. 25 (1996), holding that national banks in "small towns" are authorized to sell insurance even in States that generally prohibited all banks from acting as insurance agents, sixteen other States have enacted insurance sales consumer protection provisions equivalent to the challenged West Virginia provisions: (1) Arkansas (Ark. Code Ann. §§ 23-66-606 *et seq.*); (2) Colorado (Colo. Rev. Stat.a 10-2-601 *et seq.)*; (3) Connecticut (Coon. Gen. Stat. § 36a-775); (4) Illinois (The Ill. Ins. Code Article XLIV);

without exception—those provisions were enacted with the support of consumer advocates as well as both the banking and insurance industries in each State. The West Virginia experience was no exception. The WVBA itself actively negotiated the parameters of the legislation that included the insurance sales consumer protection provisions that they have now requested be preempted, and they endorsed enactment of that legislation. Over two dozen banks currently are actively selling non-credit forms of insurance in the State of West Virginia and their efforts do not appear to be hampered in any

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(5) Indiana (Indiana Code §§ 27-1-15.5-8 *et seq.*); (6) Kentucky (Ky. Rev. Stat. § 304); (7) Louisiana (La. Rev. Stat. §§ 22:3051-3065); (8) Maine (9-A Maine Rev. Stat. Ann. § § 4-401 *et seq.);* (9) Massachusetts (Mass. Gen. Laws ch. 1 67F, § 2A); (10) New Hampshire (N.H. Rev. Stat. Ann. §§ 406-C *et seq.*); (11) New Mexico (N.M. Stat. Ann. §§ 59 A-12-10 *et seq.*); (12) New York (N.Y. Banking Law § 14-g; N.Y. Ins. Law §§ 2123 and 2502); (13) Pennsylvania (Pa. Stat. Ann. Tit. 40, § 221.1-A *et seq.);* (14) Rhode Island (RI Gen. Laws Title 27); and (15) Texas (Texas Ins. Code Article 21).

Another seven States have promulgated similar regulations since 1996: (1) Florida (Dept. of insurance Rules 4-224.001- 4-224.014); (2) Georgia (Rules and Regulations of the Office of the Commissioner of Insurance Chapter 120-2-76 (adopted February 17.1997)); (3) Maryland (Advisory Letter Issued by the Insurance Commissioner and the Commissioner of Financial Regulation on October 31,1996); (4) Mississippi (Executive *Memorandum issued by* the Commissioner of Banking and Consumer Finance on May 13, 1997); (5) Ohio (Department of insurance Rule 3901-5-08); (6) Vermont (insurance Division Bulletin 117 (June 13,1997)); and (7) Wyoming (Chapter 16 of the Rules of the Division of Banking).

In addition, many other States permitted banks to sell insurance prior to the issuance of the *Barnett* decision and those States have always imposed consumer protections similar to the challenged West Virginia provisions. Indeed, the post-*Barnett* protections were based almost exclusively on the pre-Barnett state consumer protection provisions. Although we have not comprehensively researched the state provisions that were enacted prior to *Barnett*, representative examples include the following: (1) Michigan (Mich. Compiled Laws § 500.1243); (2) Tennessee (Tenn. Code Ann. § 56-8-106); and (3) Virginia (Va. Code §§ 38.2-501 1 *et seq.*).

way by the challenged provisions. Indeed, many of those banks are doing so in conjunction with an agency the WVBA itself created.[3] Any allegation that the west Virginia provisions at issue should be preempted because those provisions "prevent or significantly interfere with" the ability of banks to engage in insurance agency activities thus appears to be completely unwarranted—especially when asserted by the WVBA.

Although the WVBA request mirrors the request that the OCC received in 1997 regarding similar Rhode Island insurance sales consumer protection provisions,[4] it appears to present the first opportunity for the OCC to consider the GLBA Section 104 preemption standards and the scope of its authority to determine whether state insurance regulations may be preempted under those standards.

The OCC should not, however, deem any of the challenged West Virginia insurance sales consumer protection requirements preempted for two overarching reasons. First, it is clear that the OCC does not have the power to determine whether state insurance regulations are preempted by Section 104 or by any other federal law. The GLB A makes clear that the States are empowered to regulate the insurance activities of everyone, including national banks. The only limitation on

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[3] Several WVB A documents advertising the benefits of bank insurance agency activities are attached at Tabs 1-4. Tab 1 is a WVBA document encouraging West Virginia banks to enter the insurance business; Tab 2 is a WVBA summary of the advantages of utilizing its insurance agency (named "Proserv Insurance Agency, LLC"); Tab 3 is a model Management Services Agreement that WVBA member banks must sign to take advantage of the WVBA; and Tab 4 is a list of the participating banks participating in the WVBA Proserv Agency as of May 3. Although these documents note the importance of regulatory compliance, none make any statements to the effect that the current requirements interfere in any way with the bank-related insurance agency services that are being offered.

[4] *See* 62 Fed. Reg. 1950 (Jan. 14, 1997).

that authority is Section 104 but the OCC has absolutely no authority to interpret the parameters of that provision. Nothing in the Riegle-Neat Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal Act") [5] cited by the OCC in the introduction to its request for comments [6] alters this result in any way. Bart I of the ensuing Analysis will address these issues.

Second, even if the Comptroller did have the authority to pass on such preemption questions, it is clear that state insurance sales consumer protection provisions like the challenged West Virginia requirements do not "significantly interfere" with the ability of banks and bank-affiliates to engage in insurance agency activities in any way. The challenged provisions were enacted to address serious insurance consumer protection concerns and *none* violate the preemption standards established in Section 104. Bart II of the ensuing analysis will address these issues.

Analysis

I. THE OCC DOES NOT HAVE THE POWER TO PREEMPT STATE INSURANCE REGULATIONS.

A. The GLBA Leaves The Regulation Of The Business Of Insurance To The States.

The GLBA explicitly "recogniz[es] the primacy and legal authority of the States to regulate the insurance activities of all persons." [7] It does this by adopting a "functional regulation" approach which dictates that the function rather than the nature of the entity determines the appropriate

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[5] 12 U.S.C. 43.

[6] 65 Fed. Reg. at 35421.

[7] H.R. Rep. No. 434, 106th Cong., 1st Sess. (1999) ("Joint Explanatory Statement of the Committee of Conference," "Operation of State Law" discussion).

regulatory authority. Section 104(a) of the Act thus declares that—

> The Act entitled "An Act to express the intent of Congress with reference to the business of insurance" and approved March 9, 1945 (15 U.S.C. 1011 *et seq.*) (commonly referred to as the "McCarran-Ferguson Act") remains the law of the United States.

The command of McCarran is unequivocal:

> The business of insurance, *and every person engaged therein*, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.[8]

Section 301 then imposes the express "functional regulation" requirement—a directive that also specifically applies to "small town" national banks selling insurance under Section 92 and that is limited only by the preemption parameters established in Section 104—

> The insurance activities of any person (including a national bank exercising its power to act as agent under the eleventh undesignated paragraph of section 13 of the Federal Reserve Act [commonly referred to as "Section 92"]) shall be functionally regulated by the States, subject to section 104.

The challenged west Virginia provisions clearly "relate to the regulation" of the "business of insurance" under McCarran because they dictate parameters to which financial institutions and their affiliates must adhere when conducting insurance sales-related activities[9] and they thus fall squarely within Section 301's "functional regulation" directive. The only

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[8] 15 U.S.C. 1012(a) (emphasis added).

[9] *See United States Dept of Treasury v. Fabe*, 508 U.S. 491 (1993); *SEC v. National Sec., Inc.*, 393 U.S. 453,'460 (1969); *FTC v. National Casualty Co.*, 357 U.S. 560, 564-65 (1958); *Robertson v. People of the State of California*, 328 U.S. 440, 447 (1946).

question is thus whether those provisions are preempted by Section 104.

B. The OCC Has No Authority To Determine Whether A State Insurance Law Is Preempted By Section 104.

Section 104(d:) establishes the preemption parameters for state insurance sales regulations. By its own terms, the Section 104(d) preemption standard applies to *all* depository institutions and their affiliates; it is not national bank specific in any way[10] nor is there any provision that delegates interpretive authority over this provision to the Comptroller or—for that matter—to any other federal banking regulator. Indeed, the provision is not even a "banking" provision but—as noted at the outset—will be codified as part of Title 15.[11]

Moreover, the Supreme Court has made clear that, absent an express delegation of authority, a federal agency may not be presumed to have been delegated the power to determine the scope of a federal statute s preemptive reach even if the agency is charged with interpreting other components of that statute.[12] In this case, Congress' explicit intent was to ensure that the *courts* and not the agencies were empowered to decide whether state provisions are in conflict with the

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[10] Even if it were national bank specific, Section 121(e)(2) of the GLBA makes clear that all national bank "financial subsidiaries" are to be regulated as if they are a direct subsidiary of a financial holding company—i.e. by the Federal Reserve rather than by the OCC.

[11] *See* 15 U.S.C. § 6801.

[12] *In Adams Fruit Co. v. Barrette*, 494 U.S. 638, 649 (1990), the Supreme Court squarely held that, absent an express delegation of authority, whether or not a federal statute preempts a state requirement is not a "statutory 'gap' . . . , that Congress intended [the agency] to fill." This is because preemption is not a question of statutory construction, but rather a constitutional question. Congress certainly has the power to decide the preemptive effect of laws it enacts, but it has not generally delegated that authority to administrative agencies.

Section 104(d) *Barnett* standard. As Senator Bryan—the Senate sponsor of the amendment that included the Section i 04(d) provisions—noted in comments on the Senate floor in the course of explaining that the intent of the provision was to do nothing more than codify the *Barnett* standard, Congress "intended to leave the development of the interpretation of that standard to the courts." [13]

C. The Riegle-Neal Act Does Not Authorize The OCC To Determine Whether A State Insurance Law Is Preempted.

The Riegle-Neal Act relied on by the OCC in its request for comments does not alter this result in any way. The limited authority that Congress granted the OCC in the Riegle-Neal Act to make certain preemption determinations does not extend to considering whether State laws that relate to the regulation of the business of insurance—such as the challenged West Virginia provisions—noted—are preempted by Federal law. Section 102(b)(1)(B) of the Riegle-Neat Act[14] dictates that—

> The laws of the host State regarding community reinvestment, consumer protection, fair lending, and establishment of intrastate branches apply to any branch in the host State of an out-of-state national bank to the same extent as such State laws apply to a branch of a bank chartered by that State, except—
>
> (i) when Federal law preempts the application of such State laws to a national bank; or
>
> (ii) when the Comptroller of the Currency determines that the application of such State laws would have a discriminatory effect on the branch in

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[13] 145 Cng. Rec. S6046-02 (May 26, 1999). *See also* S. Rep. No. 44, 106th Cong., lst Sess. at 13 (April 28, 1999).

[14] 12 U.S.C. § 36(f).

> comparison with the effect the application of such State laws would have with respect to branches of a bank chartered by the host State.[15]

This subsection then declares that State law provisions regarding community reinvestment, consumer protection, fair lending, or the establishment of intrastate branches to which a branch is subject under these provisions "shall be enforced with respect to the branch, by the Comptroller of the Currency."[16] All other laws of the home and host States, however, continue to apply to the branch to the same extent that they would have applied in the absence of the Riegel-Neal provisions.[17]

The import of the Riegle-Neal Act was to empower the Comptroller to preempt State law provisions that impeded interstate branching. On the Act's own terms, any such determination only exempts branches operating in host States (i.e. in States other than the State in which the principle office of that branch is located) from the application of any such "preempted" laws. The request at issue here has nothing to do with interstate branching. Moreover. the Riegle-Neal Act only authorizes the 0CC to make preemption determinations related to the host State law regarding community reinvestment. consumer protection, fair lending, or the establishment of intrastate branches. Any contention that the challenged provisions may be preempted under the "consumer protection" catch-all category included in the Comptroller's authorization must fail because McCarran dictates that federal laws may preempt state insurance laws only if they "specifically relate" to insurance.[18]

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[15] 12 U.S.C. § 36(f)(1)(A).

[16] 12 U.S.C. § 36(f)(1)(B).

[17] 12 U.S.C. § 36(f)(2).

[18] *See* 15 U.S.C. § 1012(a) (dictating that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any

Finally, it is clear from the Riegle-Neal Act's legislative history that the statute was not intended to "weaken States' authority to protect the interests of their consumers, businesses, or communities." [19] Nor was it "intended to confer upon the [OCC] any new authority to preempt or to determine preemptive Congressional intent in the four areas described.[20]

The Comptroller thus has no authority to preempt state insurance sales consumer protection requirements like the challenged West Virginia provisions either under Section 104(d) or under the terms of the Riegle-Neal Act.

II. NONE OF THE CHALLENGED WEST VIRGINIA PROVISIONS WARRANT PREEMPTION.

Even if the Comptroller did have the authority to pass on such preemption questions, it is equally clear that consumer protection provisions such as the challenged West Virginia provisions do not "prevent or significantly interfere" with the ability of banks and bank-affiliates to engage in insurance agency activities in any way.

A. Section 104(d) Establishes A High Preemption Threshhold.

Under the GLBA, the only limitations on the states' insurance regulatory authority are the Section 104 preemption rules. Section 104(d) specifically addresses the preemption rules that apply to state laws and regulations that regulate insurance

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State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."); *Barnett,* 517 U.S. at 40-41 (a federal law like the Riegle-Neal Act may not be deemed to "specifically relate to the buisness of insurance" because it does not refer to or mention the business of insurance in any way).

[19] H.R. CONF. REP. NO. 103-651 at 53.

[20] *Id.* at 55. Indeed, under Riegle-Neal, the OCC is directed to issue a preemption determination "only . . when the legal basis is compelling and the Federal policy interest is clear." *Id.*

sales and solicitation activity. The primary rule is set forth in Section 104(d)(l):

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court in *Barnett Bank of Marion County NA. v. Nelson,* 517 U.S. 25 (1996), no State may, by statute, regulation, order, interpretation. or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with any other person, in any insurance sales, solicitation, or cross-marketing activity.

The GLBA very consciously incorporates the "prevent or significantly interfere" preemption standard articulated in *Barnett* and explicitly dictates that nothing in the GLBA is intended to amend or modify that standard in any way. The explicit reference to *Barnett* in the preemption provision itself and the Section 104(d)(2)(C) construction provisions both make this absolutely clear. Thus, the core preemption test is exactly the same test that applied to the West Virginia insurance sales consumer protection provisions at the time of their enactment in 1997 and immediately prior to the enactment into law of the ULBA itself.

The Supreme Court made clear in both *Barnett* and other cases that the "significant interference" standard imposes a high threshold—state laws cannot be preempted under that standard unless the requirements that regulate the manner in which insurance sales powers are exercised in some way incapacitate national banks from exercising that power or pose a direct legal obstacle that would prevent national banks from exercising their insurance sales powers. Indeed, the three cases on which the *Barnett* Court relied in articulating the significant interference standard together demonstrate that state requirements that do not undermine a national bank's

ability' to exercise its powers are not preempted.[21] Other Supreme Court authority also dictates this approach.[22]

Thus, the Act does not require the preemption of any laws that were not required to be preempted prior to its enactment; the Act does nothing to clarify that standard in any way. Indeed, the only change wrought by the GLBA is to shield 13 categories of state laws from preemption under the *Barnett* test (the so-called "safe harbors").[21] As the Section 104(d)(2)(C)(ii) construction clause makes clear, however, 'no implication can be drawn regarding whether a state statute that does not fall within one of the 13 safe harbors is preempted based on the fact that the provision is not within one of the safe harbors. Hence, if a state statute falls within one of the Section 104(d)(2)(B) "safe harbors," it is shielded from preemption. If a state statute does not fall within a "safe harbor," however, it can be preempted only if it either prevents or significantly interferes with the ability of a depository institution (or a depository institution affiliate) to exercise its insurance sales powers.

B. There Is No Evidence To Justify The Preemption Of Any Of The Challenged West Virginia Insurance Sales Consumer Protection Provisions.

All of the challenged West Virginia insurance sales requirements are consumer protection provisions that are

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[21] *See, e.g. National Bank v. Commonwealth,* 76 U.S. (9 Wall) 353 (1869) ("[i]t is only when [a] State law *incapacitates* the banks from discharging their duties to the government that [the State law] becomes unconstitutional."), *relied on in Barnett.* 517 U.S. at 33-34.

[22] *See, for example, Zablocki v. Redhail,* 434 U.S. 374, 387 n.2 (1978) (a state law "significantly interferes" with the exercise of a federal right only where that state law either imposes "direct legal obstacles in the path of the person desiring to" exercise the federal right or "significantlydiscourage[s], let alone makes practically impossible," the exercise of that right).

[21] *See* GLBA § 104(d)(2)(B).

designed to address the unique consumer concerns that arise when financial institutions that offer federally-insured deposit products and that extend credit also engage in insurance sales activities, either directly or in conjunction with. an affiliate. As a general matter, all of the challenged provisions are designed to address two overarching concerns: (1) the consumer confusion that arises when federally-insured banks also sell non-federally insured products like insurance and annuities and (2) the explicit or implicit pressure that a consumer often feels to purchase insurance from a lender to whom they have submitted a credit application in order to enhance their eligibility for the desired credit. As droves of consumer advocate groups pointed out in response to the OCC's 1997 Rhode Island preemption request for comments, these unique concerns can mislead consumers into purchasing products that they do not understand or that are inadequate for their needs.[24] The provisions are thus vital to protect the interests of banking customers who also are prospective insurance customers of those financial institutions.

In any event, as illustrated at length below, three of those challenged West Virginia insurance sales consumer protection provisions fall squarely within one of the Section 104(d)(2)(B) safe harbor ,provisions. In addition, there is no evidence whatsoever that any of the challenged consumer protection provisions can be deemed to "significantly interfere" with the ability of national banks (or of any other depository institution or affiliate) to sell insurance. indeed, the very fact that dozens of state and national banks have entered into the insurance business in the State of West Virginia since these provisions were enacted and have been

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[24] The joint 1997 comments submitted to the OCC by the Consumer Federation of America, Consumers Union, and U.S. Public Interest Research Group explain these consumer protection concerns and the manner in which the challenged provisions address those concerns in great detail. A copy of those comments is attached hereto as Tab 5.

successfully operating without incident under the conditions imposed by those provisions is itself a powerful demonstration that none of the challenged provisions is even interfering in any way with bank-related insurance agency activities in West Virginia.

Sales Force Separation. The Requester first challenges section 33-1 1A-6 of the West Virginia Act, which prohibits financial institution employees with loan or deposit-taking responsibilities from soliciting and selling insurance.[25] The Requester contends that this provision does not fall within one of the GLBA's Safe Harbors and believes that this provision will "significantly interfere with the ability of financial institutions to engage in insurance activities [by]. . . requir[ing] the use of more personnel than may be needed to conduct the business."[26] The Requester adds that this requirement will reduce the incentive to use technologies designed to "minimize use of personnel."[27]

As noted above, the fact that a state insurance regulation does not fall within of the GLBA safe harbor provisions is the beginning rather than the end of the inquiry. And there is absolutely no evidence that this provision constitutes a "significant interference" within the meaning of *Barnett.* indeed, no argument has been made that larger banking institutions have any difficulty complying with this requirement. These institutions require several employees to handle numerous loan and insurance transactions. Requiring these institutions to assign certain employees to loan and deposit transactions while assigning others to insurance sales and solicitations would have little effect on the operations of these banks. As the West Virginia law quotations included in the 0CC notice recognize, however, smaller institutions might

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[25] *See* 65 Fed. Reg. at 35,421.

[26] *Id.*

[27] *Id.*

have difficulty complying with this provision and may thus be exempted from its requirements under specified circumstances. Under the challenged provision, for example, in financial institutions—

> having three or less individuals with lending authority, solicitation of the sale of insurance may be conducted by an individual with responsibilities for loan transactions . . . as long as the primary person responsible for making the specific loan or extension of credit is not the same individual engaged in the solicitation of the purchase or sale of insurance for that same transaction.[28]

The challenged provision also includes a waiver process for smaller banks.[29] These provisions thus excuse smaller institutions from strict compliance with the overall requirement and therefore eliminate any undue burden that the requirement might otherwise have placed on smaller banks. The OCC has previously reviewed a virtually indistinguishable Illinois sales-force separation requirement and has concluded that—especially in light of the laws small-bank accommodations—it is the type of state insurance regulation that "reflect[s] sound consumer protections applied to the solicitation and sale of insurance by national banks in a practical approach that does not raise substantial, unique burdens for national banks that significantly impair or potentially prevent their ability to exercise their powers."[30] There is thus no basis for the contention that small banks will not be able to comply with the requirements because, under the terms of the challenged provision itself, they need not comply.

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[28] *Id.*

[29] *See id.*

[30] OCC Mem. To Comptroller E. Ludwig From Chief Counsel Julie L. Williams Re "Recent Illinois Insurance Sales Law" at 5 (Oct. 14, 1997).

The argument that this provision will limit the use of technology designed to minimize personnel is similarly unsubstantiated. Financial institutions may use this technology to reduce the number of employees providing loan and credit services as well those engaging in the sale of insurance. The requirement that sales personnel be separated does not affect the ability of financial institutions to streamline their operations. The Requester's argument in this regard is thus baseless.

Tying. The Requester next challenges section 33-11A-8 of the West Virginia law, which generally prohibits financial institutions from requiring or implying that a customer's purchase of an insurance product from *that* institution is a prerequisite for loan approval.[31] Specifically, the Requester asserts that this provision does not fit within one of the safe harbors and is preempted because it significantly interferes with banks' insurance activities by "essentially prohibit[ing] a loan officer from mentioning to a customer thatinsurance products may be available at a discount as part of a package of bank services."[32] The Requester also contends that that this provision conflicts with the anti-tying provisions of the Bank Holding Company Act ("BHCA").[33]

To begin, this provision squarely falls within the Safe Harbor provision contained in section 104(d)(2)(B)(viii) that empowers the states to impose "[r]estrictions prohibiting the extension of credit . . . on the condition or requirement that the customer obtain insurance" from that institution. The West Virginia law imposes this precise restriction. Because this provision falls directly within this Safe Harbor exception, it cannot be preempted.

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[31] *See id.*

[32] *Id.*

[33] *Id.* The federal anti-tying provision is codified at 12 U.S.C. § 1972.

Moreover, there is absolutely no evidence to support the contention that this provision prohibits bank employees from "mentioning to a customer that insurance products may be available at a discount as part of a packaging of bank services." The provision merely restricts bank employees from requiring or suggesting that a consumer, seeking loan approval, must purchase insurance from *that* financial institution. This section has never been interpreted to prohibit bank employees from informing customers of the availability of insurance products. Clearly, it is not "significantly interfering" with any bank's insurance operations.

The Requester's contention that the provision conflicts with the BHCA anti-tying provisions also is entirely unfounded. There is no conflict between 12 U.S.C. §1972 and the West Virginia law. Under the BHCA, banks may notify customers that insurance is required to obtain a loan, and may inform customers that insurance is available from the financial institution. The West Virginia law does not prohibit this communication. What the West Virginia law does prohibit is requiring or implying that the customer *must* purchase the required insurance from the *same* financial institution providing the credit. The federal anti-tying provision not only does not permit such statements, it prohibits such tying.

Disclosures. The Requester's third challenge is to section 33-11A-9 of the West Virginia law, which requires financial institutions engaged in insurance activities to "disclose to customers in writing the nature of the product sold." [34] The Requester contends that the provision is preempted because it exceeds the disclosure requirements of the Safe Harbor provision in section 104(d)(2)(B)(x) and does not fail within the Safe Harbor provision of section 104(d)(2)(B)(iii).[35] The

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[34] 65 Fed. Reg. at 35421.

[35] 65 Fed. Reg. at 35422.

Requester further asserts that subsection (c) of section 33-11A-9—which requires that written disclosures be contained in separate documents—is unduly burdensome, and is thus preempted.[36]

Although the West Virginia disclosure provision admittedly does not fall within the Section 104(d)(2)(B)(iii) safe harbor, it does appear to fall within the Section 104(d)(2)(B)(x) safe harbor. That safe harbor provides that states may require certain "clear and conspicuous disclosure[s], in writing, where practicable, to the customer prior to the sale of any insurance policy." The West Virginia requirement does nothing more than that.

Moreover (and contrary to the Requester's contention), a state law is not preempted merely because it falls outside of the Safe Harbor provisions or because an unsubstantiated allegation is made that it is "unduly burdensome." State law provisions that do not fit within the Safe Harbor protections are not preempted unless there is evidence that they "significantly interfere" with federal law. Even if this provision does not fall within the Safe Harbor provisions (which it does), there is no evidence that this regulation has imposed a burden on financial institutions that substantially interferes with their ability to conduct insurance activities. Indeed, the OCC itself has recommended that such disclosures be given "during any customer contact".[37] National banks in West Virginia also have complied with this West Virginia regulation without incident.

Timing of Solicitation. The Requester challenges section 33-11A-10 of the West Virginia law, which generally forbids a bank from approaching a loan applicant to make an insurance related referral or solicitation to purchase insurance until the

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[36] *See id.*

[37] OCC Advisory Letter AL 96-8 at 15 (Oct. 8, 1996).

loan has been approved.[38] The Requester asserts that this provision is not covered by the Safe Harbor protections and argues that the provision is preempted because it significantly interferes with the ability of banks "to market the full range of products."[39]

Although this provision does not fail within one of the safe harbors, it should not be deemed preempted because it cannot be said to "significantly interfere" with the ability of banks to engage in the insurance business. The Requester's argument that this provision "prohibit[s] 'loan officers from marketing the full range of products offered by an institution" is simply unfounded. This provision does not prohibit a bank from informing consumers that it sells insurance and other products. It merely regulates *when* the financial institution may solicit consumers. Such a requirement hardly interferes significantly with a banks insurance activities. It is a non-material restriction that does not affect the ability of banks to sell insurance.

Insurance In Connection With A *Loan.* The Requester next challenges section 33-11A-11 of the West Virginia law, which requires that "extensions of credit and insurance sales be completed independently through separate documents."[40] The Requester argues that the inclusion of the "term 'independently' removes the provision from the protections of section 104(d)(2)(B)(xiii) of the Safe Harbors which requires the maintenance of separate and distinct books and records relating to insurance transactions."[41] The Requester also contends that the requirement that these transactions remain separate imposes an undue burden on financial

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[38] *See id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

institutions and their, customers creating a significant interference with banks' sale of insurance products. [42]

First, the provisions included in 33-11A-11 are protected by the Section 104(d)(2)(B)(xi) and (xii) safe harbors, not by the (xiii) safe harbor. The subsection (xi) safe harbor squarely protects state provisions requiring that insurance and credit transactions be completed through "separate documents." The Requestor essentially argues that the inclusion of the term "independently" in the West Virginia provision removes it from the ambit of the subsection (xii) safe harbor because it will require customers to "make separate trips to the bank" to sign the documents and, thus, significantly interferes with the insurance activities of banks. Nothing in the provision, however, requires a customer to make separate visits to the bank; it merely requires that the credit and insurance transactions be completed independently through the signing of separate documents. Indeed, the OCC itself has advised national banks to consider the use of "separate and *independent* documents" to complete related credit arid insurance transactions to reduce potential confusion.[43] The West Virginia requirements are thus "substantially similar" to the safe harbor protections and exempt from 'preemption.

Confidential Information. The Requester's sixth challenge is to section 33-11A-13 of the West Virginia law, which generally prohibits financial institutions from using "insurance information obtained in the making of a loan" for the purposes of selling or soliciting the purchase of insurance.[44] The Requester contends that this provision exceeds the protections of the Section I 04(d)(2)(B)(vi) safe harbor and that it significantly interferes with the ability of

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[42] *See id.*

[43] OCC Advisory Letter AL 96-8 at 15 (Oct. 8, 1996).

[44] *Id.*

financial institutions to "identify customer needs and suitable products to meet the needs of those customers.[45]

Although the provision is not protected by the subsection (vi) safe harbor, there is no basis for finding that it constitutes a "significant interference" with a national bank's insurance sales activities for at least two reasons. First, the proper inquiry is not whether a challenged provision significantly interferes with a bank's ability to "identify customer needs" but whether it significantly interferes with the bank's ability to exercise its insurance sales authority. Second, two components of the challenged provision negate any concern that a bank will not be able to identify and satisfy the needs of customers who want such services—subsections (a) and (b) explicitly provide that a consumer may consent, in writing, to the disclosure of insurance information for any purpose. The provision therefore only restricts the usage of information that a consumer has not authorized the institution to use. There is thus no basis on which to conclude that this provision should be preempted because it does not significantly interfere with the ability of banks to engage in any insurance activities whatsoever.

Physical Separation. Finally, the Requester challenges section 33-11A-14 of the West Virginia law, which generally requires financial institutions to physically separate their lending and insurance activities.[46] The Requester objects to this provision on the grounds that it does not fall within any of the GLBA safe harbors and that the provision significantly interferes with "bank sales of insurance products, particularly with regard to smaller institutions with limited space and personnel" to engage in insurance-related activities.[47]

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[45] 65 Fed. Reg. At 35423.

[46] *See id.*

For at least two reasons, there is absolutely no basis on which to conclude that this requirement constitutes a "significant interference." First, as Senator Bryan observed in his comments on the bill, "provisions that merely require the physical separaton of insurance activities from other activities within a bank are not preempted under the Section 104(d)(2)(A) preemption standard. Second, the GLBA federal consumer protection "minima" included in Section 305 require the federal banking regulators to themselves promulgate regulations by November of this year that include provisions requiring the separation of deposit-taking and insurance activities.[48] And third, the Requester's primary concern with the inability of smaller institutions to satisfy the requirement is completely unwarranted because the provision includes a waiver clause under which smaller institutions can request exemption from the requirements.

We would be pleased to submit additional information clarification as necessary.

Sincerely,

/s/ Scott A. Sinder
SCOTT A. SINDER
Christen English
Counsel for the Insurance Agents

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[48] *See* Section 46(d) of the Federal Deposit Insurance Act (added by GLBA Section 305). The requirements that will be imposed are "minima" because the States are given the express power to impose more protective requirements. *See* FDIC Section 46(g)(2).

[LOGO]

West Virginia Bankers Association

HOW AND WHY BANKS SHOULD SELL INSURANCE

Presented to:

The West Virginia Bankers Association"

Presented by:

Acordia Specialty
Lee Jordan, Senior Managing Vice President
Lisa Sargent, Vice President
Phillip (Pork Chop) Booth, Senior Vice President

1999

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I.

OBJECTIVE

Create an entity that would enable member banks of the WVBA to maximize their noninterest fee income; retain their customers, attract new customers and keep up with the competition from other banking and nonbanking entities at a minimal cost to member banks.

This entity would financially strengthen the Association and the member banks.

II.

WHY BANKS SHOULD SELL INSURANCE

1) Customer Retention
2) Attract New Customers
3) Maximize Noninterest Fee Income
4) Meet Competition
5) Best Source of Noninterest Fee Income
6) Their Customers Expectations of Products and Services

The 1980's saw great turmoil in the financial services industry resulting from several factors and leading to numerous changes in both the insurance and banking industries.

The primary change was a frenzy of mergers and acquisitions and a complete reevaluation of their product distribution systems.

Banks have lost ground to other financial intermediaries as non banking institutions capture traditional banking business.

As interest margins have shrank, non interest fee income has become increasingly important.

To offset the effects of sluggish loan growth, thinner margins and lost business to nonbank competitors, banks have sought to increase noninterest fee income from such activities as trust activities, investment and annuity sales, insurance, asset management and investment banking.

While deposits are flowing away from all banks, it is the small banks that have the biggest problem because they have fewer funding sources.

Despite any data reflecting signs of growth in gross outstandings, banks no longer dominate business lending.

Nearly 80% of all such loans come from nonbank lenders like life insurers, brokerage firms and finance companies.

OBVIOUSLY BANKS NEED TO DIVERSIFY INCOME SOURCES WITH NONINTEREST FEE INCOME.

Interest income, managing net interest margin and charging transaction fees is not enough to preserve the place of banking. ADDITIONAL FI1NANCIAL SERVICES must be provided. By combining their relationship skills and distribution systems BANKS CAN BECOME TOTALLY INVOLVED IN EACH CUSTOMERS FINANCIAL SERVICES NEEDS!

Why fee income? Banks are typically measured on "return on assets." With fee income they can increase their "ROA" without increasing their "A." Fee income usually entails little call on capital, which means the earnings are from a source that does not put strain on a banks' financial resources, if done properly.

To generate fee income, banks need to subscribe to a simple *new* business truth about banking—for banks, marketing and selling are now strategic, not tactical functions. Most of the banks that have high fee incomes in relation to assets are *aggressive* marketers of a wide variety of consumer products.

Many banks offer these products for purely defensive reasons, *so money does not leave the bank* and the customer relationship with the bank is deepened and broadened.

Even though not all ventures have succeeded their is great opportunity for banks selling P&C insurance. While some bankers have focused on personal lines, sizable premiums may be earned in the commercial or business markets. What better way to enhance the core business of commercial banking, lending money to businesses, the loss of which the Comptroller recently stated "for some community banks the

key to their future is to tam their attention away froth less profitable consumer lending and home mortgages in favor of focusing more exclusively on their small business niche."

Business related insurance premiums were distributed in the following proportions:

- 14% group annuities
- 6% group life, accident, disability
- 2% group vision, dental, long term care
- 2% business life
- 44% group heath
- 31% commercial lines

Most small businesses do not have primary investment advisors for pension assets, or personal assets. Accountants rate highest as "most trusted advisor," the most instrumental in succession planning and estate planning. Bankers rank second.

Small businesses are normally underinsured.

- 55% have no group health insurance
- 62% have no AD&D
- 69% Have no group life insurance
- 70% have no Rx coverage
- 77% have no disabĩlity income protection
- 86% have no dental care coverage
- 91% have no vision care

Hopefully you agree with the need to maximize your income and recognize the opportunities selling insurance products present.

III.

METHODS OF SELLING

1) Bank owned and operated agencies

2) Bank owned agencies managed and operated by others under contract

3) Joint venture agencies

4) Marketing agreements directly with insurance companies

5) Association agencies

The method we are proposing is an Association Agency which captures the best features of the other options with minimal risk to the member banks.

Bank owned and operated agencies require substantial investment for buying existing agencies or hiring experienced insurance sales personnel or both. These investments are at risk due to potential failure of the entity such as the recent failed attempt of Wells Fargo and Fleet.

Bank owned agencies managed and operated by others; joint venture agencies; TPM agencies and marketing agreements directly with insurance companies all embody some common advantages which we capitalize upon through our Association Agency operated by Acordia; you do not have to buy agencies, hire insurance sales people, evaluate insurance companies, license your staff, develop insurance products or services. All of these functions would be the responsibility of Acordia.

You literally would be in the business of benefiting from insurance sales practically without risk and investment.

There are numerous methods of insurance product distribution including:

Methods	Responsibility
1) Remote Marketing/ Direct Mail	Acordia and selected insurance carriers
2) Face-to-face Sales Force	Acordia
3) Cross Selling	Acordia
4) Dedicated Sales Force	Acordia

The primary function of the banks will be to recognize opportunities and make referrals.

The banks have advantages and opportunities over their competition including:

- Greater customer affinity and proximity
- More frequent customer contact
- Broader range of client segments
- At the point of customers needs origination
- Coordinated marketing efforts
- Data base marketing, customer segmentation and target markets
- Wider variety of marketing methods
- Wider variety of selling methods

We would utilize joint efforts such as estate planning seminars for bank customers. Acordia would conduct the seminar and furnish the CPA, Life Ins. Salesperson and Tax Lawyer.

We would visit, along with a representative of the association, each member bank to inform them of potential

opportunities; we would utilize the association newsletter and seminars to introduce new products.

As you can see there are numerous methods of selling insurance. But all methods and our resulting success will depend upon total cooperation of all parties.

IV.

WHY THROUGH THE ASSOCIATION

- All banks have the same opportunity
- Nominal investment required
- Minimal risk to member banks
- Success will strengthen Association
- Entity could attract new members
- Entity could retain existing members
- Association will be catalyst for all activities, especially communication
- Grouping of all members will attract more interested insurance carriers

As demonstrated in this report the Association involvement is essential and necessary.

Utilization and support of the Association entity allows all member banks to offer the same products and services being offered by their large competitors, bank and nonbank, without having incurred the expense or risk.

The Association will also offer technical and legal guidance to all involved parties.

V.

WHY ACORDIA

- National Recognition
- Broad Capabilities
- Geographically Compatible
- Carrier Strength
- Insurance Knowledge

Acordia is the fifth largest broker in the world and the largest privately owned broker.

We have unique capabilities in all fields of insurance and will avail those to the member banks.

As a result of the consolidation of Flat Top Insurance, Chamberlain & Flowers and McDonough Caperton, we are strategically located in all parts of WV. Additionally, since we are a national broker we can answer your clients needs or requirements in any state.

We bring the necessary and needed expertise, knowledge, carriers and experience to facilitate the success of this venture.

VI.

WHAT IS NECESSARY TO REALIZE OUR OBJECTIVE

- Cooperation
- Support
- Persistence
- Patience Effort
- Commitment
- Acceptance
- Trust

To realize success, especially to the greatest degree possible, the member banks must accept and support this venture. Top management must cooperate and communicate to their employees the importance of this function.

We must all make the effort, be persistent while remaining patient. We will not realize ultimate success overnight but there is not a single inherent reason why we should not succeed.

Our success will require strategic planning to entail evaluating a banks' insurance opportunities and capabilities; creation of a communications program with all bank employees; identify opportunities within the bank and the banks' customers; etc.

For our program to succeed it must have committed support from the directors and senior management. Each bank should adopt a statement, polices and procedures to support the program.

Everyone must be patient because success will not happen overnight. Successful insurance selling involves renewal premiums and repeat sales.

It takes time to develop and mature to success any business endeavor, but particularly insurance which by its nature is inherently a long-term business enterprise.

Having waited so many years to attain broader bank insurance sales powers, surely banks can invest the patience necessary to evaluate their opportunities, plan their approach, implement their plans, monitor their results, and evolve their strategy.

Success in bank insurance depends upon staying power. If senior bank managers are not prepared to demonstrate this virtue, they should reconsider getting into the insurance business.

Banks are positioned to answer their customer's insurance needs. If we use common sense; employ good judgment; systematically evaluate our opportunities and options; establish reasonable, achievable objectives; effectively implement our strategies and tactics; there is no reason why we cannot succeed.

VII.

POTENTIAL RESULTS

- Additional Loan Potential
- Customer Retention
- New Customers
- New Noninterest Fee Income
- Stronger Competitive Position
- Intangible Benefits

We already have touched upon most of the results we will achieve except for specific revenue examples and Intangible Benefits.

Earlier we mentioned that most small businesses have not addressed their estate planning and business continuity needs. How many of your business customers could you save by protecting their estates?

Intangible Benefits:

- Your small business partnership customer was very successful, had been your client for ten years, business was good profits were up; family incomes were secure, then one of the partners died.

  The remaining partner was unable to continue the business.

  This could have been avoided had the partnership been sold life insurance to fund a buy-sell agreement. Estates, without proper planning, can be devastated by estate and inheritance taxes.

- Estate liquidity can be met with life insurance. A lifetime of estate building can be destroyed when heirs are forced to liquidate assets in order to raise money to pay debts, federal estate taxes and state inheritance taxes. The

Wrigleys, who owned the Chicago Cubs, could have saved $40 million.

- Charles Crocker, founder of Crocker National Bank, left an estate of 5 Million. The day before he died he owed less than $50,000. The day after he died his total estate settlement costs were 2.4 Million.
- Albert Wiggin, who was chairman of Chase National Bank had a valued estate of 20.5 Million when he died. Almost 15 Million was required to pay settlement costs.

Intangible benefits include protecting your customers and their families which should lead to stronger, long-term relationships, greater goodwill and enhanced reputation.

Additional Loan Potential

Some of our products, such as the environmental loan protection policy, will enable the member banks to make loans on properties previously considered unacceptable.

Potential Revenue

How is your crystal ball? Mine is a little cloudy but I will endeavor to offer reasonable projections based upon reasonable expectations.

- Can we convert your customers list into a book of business?
- Can we convert your corporate insurance program into your association owned agency?
- Will you aggressively embrace the productportfolio at all opportunities?

Example: Actual Bank Profile

- Assets $250 million
- Deposits $226 million
- $4 million before tax income

- $2.6 million after tax income
- Net interest income $3.12 million
- 1,750 Commercial Customers
- 18,200 Household Customers
- 925 Auto Loans
- 50 Residential mortgages

This bank secured economic assessment report to assess its potential opportunity in selling to its banking customers and capturing its own corporate program.

One of the great advantages a bank needs to exploit in selling insurance is the fact that it is at "the point" of customer needs origination and fulfillment.

These projections assume that all insurance programs are fully installed and up and running at the same time.

- Ordinary Life Insurance and Cash Accumulation Products (See Tables No. 1 & No.2)

The category ordinary life insurance includes personal life and accident and health insurance. Products may include whole life, term, universal life, variable life, variable universal life, disability income protection, and long-term care insurance.

Table #1

Life Retail Assumptions

Ordinary Life Insurance–Sales Force Ratios/Year

	Bank Customer	Bank Employees	General Public	Total
Prospect Interviews	1,200	50	200	1,450
Sales Closing Ratio	25%	15%	10%	22%
Sales Year	300	8	20	328
Avg. Annual Premium	$944	$944	$944	$944
Annual Premium Volume	$283,200	$7,552	$18,880	$309,632
Revenue to Assoc. Agency	$70,800	$1,888	$4,720	$77,408

Table #2

Annuities Retail Assumptions

Cash Accumulation Products–Sales Force Ratio/Year

	Bank Customer	Bank Employees	General Public	Total
Prospects Year	300	50	200	550
Sales Closing Ratio	25%	15%	15%	20%
Sales Year	75	8	30	113
Avg. Annual Premium	24,000	5,000	18,000	21,062
Annual Premium Volume	1,800,000	40,000	540,000	2,380,000
Commission	30,903	1,575	1,776	34,254

Table #3

Banks Own Corporate P&C Insurance Coverages

Coverages	Premium
Financial Institution Bond	Included
Fidelity	Included
Combination Safe Depository	Included
Special Risk Extortion	Included
Worker's Comp–Employer's Liability	Included
Package Includes EDP Coverage	Included
Business Auto	Included
D&O Includes EPL	Included
Fiduciary Liability	Included
Mortgage E&O	Included
Umbrella Liability	Included
Special Bank/EE Programs	Included
Total Premium	$62,500
Commission Revenue	$2,500

Note: This illustration represents "one" bank. We obviously would be considering all of the member banks.

Does not reflect potential return premiums via dividend program.

Association Health Insurance

Employee Health Care *	$362,565
Employee Group Disability	Included
Employee Group Life Insurance	$44,862
Total Group Employee Premiums	$407,427
Commission Revenue	$16,297

* Based upon 600 Employees

Table #4

Business Life Insurance For Commercial Customers

Commercial Customer Loan Account Type	Number of Customers	Penetration for Insurance	Average Premium	Agency Revenue
Less than 50K	265	31	$2,500	$10,000
51K-250K	56	6	$5,000	$7,500
250K+	32	3	$10,000	$7,500
Total	353	40	$3,438	$25,000

Table #5

Commercial Insurance for Commercial Customers

Commercial Customer Loan/Account Type	Number of Customer	Penetration of Customers	Association Revenue
Less than 50K	$1,060	123	$13,530
51K – 250K	$376	41	$18,040
250K+	$315	17	$19,421
Total	$1,751	181	$50,991

Table #6

Homeowners Insurance--5 Year Revenue Potential

Program Year	New Premium	Sales Commission	Renewal Commission	Association Revenue
1	$46,589	$1,864		$1,864
2	$46,589	$1,864	$1,584	$3,448
3	$46,589	$1,864	$2,930	$4,794
4	$46,589	$1,864	$4,075	$5,938
5	$46,589	$1,864	$5,048	$6,911
Total	$232,945	9,320	$13,637	$22,955

Table #7

Automobile Insurance 5 Year Revenue Potential

Program Year	New Premium	Renewal Commission	Total Premium	Association Revenue
1	$10,817		$270,444	$10,817
2	$10,817	$6,490	$486,745	$17,306
3	$10,817	$11,682	$659,810	$22,498
4	$10,817	$15,835	$798,262	$26,652
5	$10,817	$19,158	$909,024	$29,975
Total	$54,085	$53,165	$3,124,285	$107,248

Table #8 Income Statement For Association Agency

Gross Sales Revenue	Year 1	Year 2	Year 3	Year 4	Year 5	Total
Gross Revenue Life Insurance	$77,408	$77,408	$77,408	$77,408	$77,408	$387,040
Gross Revenue CAP	$34,254	$34,254	$34,254	$34,254	$34,254	$171,270
Banks Own Corporate & Employee Group Covers	$18,797	$18,797	$18,797	$18,797	$18,797	$93,985
Commercial Customers' Commercial Insurance	$51,000	$79,050	$106,717	$128,060	$156,233	$521,060
Business Life Insurance for Commercial Customers	$25,000	$25,000	$25,000	$25,000	$25,000	$125,000
Automobile Insurance	$10,817	$17,306	$22,498	$26,652	$29,975	$107,248
Homeowners Insurance	$1,864	$3,448	$4,794	$5,938	$6,911	$22,955
Total	$219,140	$255,263	$289,468	$316,109	$348,578	$1,428,558
Sales Force Expenses	$0	$0	$0	$0	$0	$0
Insurance Agency Expenses	$0	$0	$0	$0	$0	$0
Net Income Before Tax *	$219,140	$255,263	$289,468	$316,109	$348,578	$1,428,558

* Does not include numerous products we will offer (i.e., title insurance, VSI, LSI, Forced Placement, Receivable Protection, Home Warranties, Environmental Products, Equipment Maintenance Insurance, Securities, etc.)

Also remember that example is on "one" bank of $250 million.

Table #9

Commercial Customer Base

Potential For Commercial P&C Insurance Commercial Clients Portfolio Assumptions	
Total Number of Commercial Customers	1,750
Commercial Loans on Books	1,137
Average Size Commercial Loan	$161,727
Total Commercial Loan Portfolio	$183,952,000
Number of New Commercial Loans Originated in Most Recent Year	294
Average Size	256,263
Total Amount of Commercial Loans Originated in Most Recent Year	75,341,322
Loan Clients Correctly Insured or Uninsurable	597
Loan Clients Steadfast with Current Agent	326
Loan Clients that are Prospects	213
Non Loan Clients Correctly Insured or Uninsurable	311
Non Loan Clients Steadfast with Current Agent	164
Non Loan Clients that are Prospects	140

Example Bank used for Revenue Projections

Summary of Key Points in Proposed Formation of PROSERV INSURANCE AGENCY, LLC

During the last several months, the West Virginia Bankers Association has been actively exploring general insurance opportunities for its members. Through its newly established for-profit subsidiary, west Virginia Bankers Association Products and Services Corp., Inc. ("ProServ"), the west Virginia Bankers Association proposes to establish a general insurance agency for its members. This entity, ProServ Insurance Agency, LLC, ("Agency") will sell various lines of insurance, primarily property and casualty insurance.

Under the proposed structure, a member bank will be given an opportunity to purchase an interest in the limited liability company based on its asset size. Five percent (5%v) of the LLC's income before distributions and commissions will be paid to the Agency's owners (called "Members") based upon each one's ownership interest. At its election, an Agency Member may also choose to participate in commission income to the extent available based upon referrals of the Member's customers to the Agency. Banks electing to participate in commission income will be required to meet all state insurance licensing requirements, which primarily involves having a fully licensed agent on staff.

ProServ, the West Virginia Bankers Association's for-profit subsidiary, will act as manager of the Agency but will not have an equity interest in the entity. As manager, ProServ will:

- manage the day to day operations of the agency;
- ensure that all insurance licensing, continuing education and other regulatory requirements are satisfied;
- handle distribution of income and commissions and other payments to participating Member banks;

- coordinate board and Member meetings;
- facilitate: bank participation and significant decisions affecting the agency; and
- provide accounting and legal support to the agency.

In payment for its management services, ProServ will receive a twenty-five percent (25%) management fee. This fee will b based on the gross revenue of the agency (after retention of commissions by Acordia as explained below) which will be derived from commissions earned on the sale of insurance, *See* the enclosed Management Agreement. In addition, the Agency will retain Acordia of West Virginia. Inc., a nationally recognized insurance brokerage company, to assist it in insurance safes activities. Acordia will be paid sixty percent (60%) of the net commissions earned by the agency. "Net commissions" means gross commissions received by Acordia less return commissions due customers of the Agency as a result of cancellations or premium reduction endorsements. In exchange for this fee, Acordia will:

- provide immediate access to major insurance underwriters;
- provide back office services including quotations for coverage, accounting and generation of reports relating to business origination; and
- staff the agency's toll-free call center.

A proposed Services Agreement among Acordia of west Virginia, Inc., ProServ and ProServ Insurance Agency, LLC is enclosed for your review. In addition to the terms discussed above, significant points concerning the Services Agreement are:

- the Services Agreement has a term of one year which will automatically renew unless terminated by 120 days prior notice.

- Upon termination, the Agency has the right to repurchase the book of business from Acordia for 1.? times 600 of the net annual commission income.
- Individual member banks may purchase their book of business from Acordia upon withdrawal from the Agency subject to consent of the LLC and subject to the provisions of the Operating Agreement. This purchase price amount is in addition to the amount which the withdrawing bank must pay to the Agency under the Operating Agreement.
- If Acordia retains ownership of the accounts, ProServ, the Agency and its member banks are prohibited from soliciting or selling the same insurance products to that customer account for a period of two y
- If a member bank or the Agency retains ownership of the accounts. acordia is prohibited from soliciting or selling the sae insurance products to that account for two years.
- After terminination, neither Acordia, ProServ, the Agency nor its member banks may hire the other's employees for the purpose of becoming an employee of a business in competition with Acordia or the Agency, as applicable.

The enclosed pro forma financial information has been developed for your use in evaluating an investment in the proposed agency. These differ materially from the prior pro formas and should be reviewed carefully. Please also review the notes accompanying the pro forma's carefully.

Also enclosed are the proposed Agency's organizational documents. Some significant points concerning these are:

- the Agency manager will be ProServ,. the wholly-owned for-profit subsidiary of the West Virginia Bankers Association;

- removal of Sera would require a seventy-five percent (75%) vote of all Members of the LLC;
- each LLC Member will be entitled to one(!) vote only;
- certain major transactions and events (e.g. transfer of all or sale of all of the assets of the company; acquisition of real property; additional capital contributions; dissolutions) could only be accomplished with a seventy-five percent (75%) vote of the Members;
- a change in control of a Member could result in the redemption of that Member's shares if approved by seventy-five percent (75%) of the Members; and
- no member bank (including its affiliates) may own an interest in the lie exceeding the maximum percentage owned in the LLC by any other bank (and its affiliates). The maximum ownership percentage may change from time to time depending on the addition to and withdrawal of member banks in the Agency.
- after formation of the LLC, new Members will be accepted only if approved by seventy-five percent (75%) of the current Members and subject to such capital contribution requirements as are approved at such time by true Members.
- a member bank which elects to withdraw from the LLC may purchase its corresponding book of business from the LLC for a purchase pace of 1.2 tunes 60% of the net annual commission income attributable to that bank. This purchase price amount is in addition to the amount which the withdrawing bank must pay to Acordia under the Services Agreement, A bank which is expelled from membership will not have t, e right to purchase its book of business.

Each bank participating in the Agency will have to apply for regulatory approval to make this investment. The pro

forma's and other documents assume each participating bank will receive regulatory approval. More information concerning the regulator approval process will be available at the organizational meeting.

As always, the West Virginia Banners Association and its counsel are available to answer questions you may have concerning the proposed investment. However, we urge you to read these documents carefully and review theme with your own legal and financial advisors.

PROSERV INSURANCE AGENCY. LLC
POSSIBLE OWNERSHIP—ASSET BASED SCALE

Percentage of ownership is determined by total assets of your institution as or December 31, 1999.

Total Assets	Ownership % Units (A)	Initial Capital	
$0-50 milllion	2.069%	$3,000	3.
$50-100 million	3.44825%	$5,000	4.
$100-150 million	4.8276%	$7,000	5.
$150 million & over	6.8966%	$10,000	6.

Notes: 1. Initial capitalisation should be between 100% and 125% of estimated capital to open..

2. Once the agency opens, entry by additional banks will be subject to agency discretion subject to the agency's operating agreement.

Estimated initial cacitalization based on survey:

3. 5 banks x $3,000 = $15,000
4. 8 banks x $5,000 = 40,000
5. 10 banks x $7,000 = 70,000
6. 2 banks x 10,000 = 20,000

25 banks Total $145,000

(A) Ownership %'s by asset group will vary depending on the actual number of initial member banks and in which asset group they fall. The total of ail of all ownership units must equal 100%.

7. Five percent (5%) of income before distributions and commissions will be reserved and paid as distributions to both full participant investors (investors who will earn income described in Note S below and commissions through licensed agents , described in Note g below, in addition to this 5 distribution) and passive investors (investors who will earn only this 5% distribution).

8. Income on first year homeowners will be shared among the full participant Member banks based on each Member bank's initial capital contribution, Renewals will be treated as commissions and will be shared among the full participant Member banks as described in Note 9 below.

9. After calculating the distributions in (7) and (B) above, the remaining 'Net Receipts' (as defined in the Agency's Operating Agreement) will be paid as commissions to the full participant Member banks in proportion to the commissions produced by each full participant Member bank relative to the total commissions produced by all of the full participant Member banks.

PROSERV INSURANCE AGENCY, LLC
CAPITAL REQUIREMENTS TO OPEN

OFFICE EQUIPMENT & START-UP COSTS includes everything needed to open an insurance agency, i.e., furnishings, computers, telephones, legal, printing, etc.		$50,000
INITIAL MARKETING & ADVERTISING Efforts to market the agency		$7,000
LOAF FROM WYBA		
Original loan	$100,400	
Money used to-rate	(28,000)	$28,000
Available for borrowing	$72,000	
WORKING CAPITAL Approximately four months' expense reserve (including Management fee)		$50,000
TOTAL CAPITAL TO OPEN		$145,000

Note: $145,000 =100% of initial capitalization.

PROSERV INSURANCE AGENCY LLC
INCOME STATEMENT ASSUMPTIONS

1. The Agency will open for business as soon as certain issues are resolved with the insurance Commissioner. The budget's first year represents the first 12 months of operation, and it does not parallel the reporting cycle.

2 A survey of WVBA member banks yielded 17 responses; 5 provided no information; the remaining 12 hanks did complete the survey. From these an average bank was determined which would be used for the calculation of revenue for each insurance product offered by ProServ insurance Agency, LLC (the "Agency" or "ProSecv").

3. The "average bank" has assets of $360 million.

CONSUMER

4. Homeowners insurance—449 loans per year—20% penetration/success rate. Commissions are 15%. The success rate is projected to increase to 22% and 24% in years 2 and 3, respectively.

5. Homeowners equity line-of-credit insurance—211 loans per year 20% penetration/success rate. Commissions are 15%. The success rate is projected to increase to 22% and 24% in years 2 and 3.

6. Auto (Direct) insurance—1,124 loans per year—5% penetration/success rate. Commissions are 15. The success rate is projected to increase to 7% and 9% in years 2 and 3, respectively.

7. Auto (Indirect) insurance1,000 loans per year—5% penetration/success rate. Commissions are 15%. The success rate is projected to increase to 7% and 9% in years 2 and 3, respectively.

8. Recreation Vehicles insurance—123 scans per year—5% penetration/success rate. Commissions are 15%. The success rate is projected to increase to 7% and 9% in year 2 and respectively.

COMMERCIAL

9. Business Packages insurance (up to $1 million in gross revenue)—1,071 loans per year—5% success rate. Commis sions are 15%. The success rate is projected to increase to 7% and 9% in years 22 and 3.

10. Environmental Liability insurance—15 loans per year—average premium $1,504 per loan = $7,500. The commissions are 10%.

11. Accounts Receivable insurance—3 loans per year—premium = $15,000. Commissions are 10%.

BANK COVERAGE

12. D&O, E&O, blanket bond, et.al.,—own bank—average premium = $65,000. Commissions are 12%.

PROSERV'S SHARE

13. ProServ's gross revenue is equal to 40% of total commissions.

PROSERV INSURANCE AGENCY, LLC

Year 1 PROJECTION OF FIRST THREE YEARS' INCOME – TOTAL FOR ESTIMATED 25 PARTICIPATING BANKS

PRODUCTS	# of Loans	20% Success	5% Success	Avg. Premium	Total Premium	Commission %	Commission $	ProServ 40%
CONSUMER								
Homeowners	11,225	2,245		$500	$1,122,500	15	$168,375	$67,350
Homeowners Equity Line of Credit	5,275	1,055		500	527,500	15	79,125	31,650
Auto (Direct)	28,100		1,405	1,500	2,107,500	15	316,125	126,450
Auto (Indirect)	25,000		1,250	1,500	1,875,000	15	281,250	112,500
Rec. Vehicle	3,075		154	500	76,875	15	11,531	4,613
COMMERCIAL								
Business Packages: (up to $1mm in gross revenue)	26,775		1,339	7,500	10,040,625	15	1,506,094	602,438
Environ. Liab	375			1,500	562,500	10	56,250	22,500
Accounts Receivable	75			15,000	1,125,000	10	112,5000	45,000
BANK COVERAGE:								
D&O, E&O, Blanket Bond, et. al.				65,000	1,625,000	12	195,000	78,000
TOTAL							$2,726,250	$1,090,500

Note : This represents the total production of 25 banks based on one "average bank" with $360 million in assets.

Year 2 PROJECTION OF FIRST THREE YEARS' INCOME – TOTAL FOR ESTIMATED 25 PARTICIPATING BANKS

PRODUCTS	# of Loans	22% Success	7% Success	Avg. Premium	Total Premium	Yr 1 Renew. Prem (Note3)	Comm. %	Total Comm. in $	ProServ 40%
CONSUMER									
Homeowners	11,786	2,593		$500	$1,296,488	$954,125	15	$337,592	$135,037
Homeowners Equity Line of Credit	5,539	1,219		500	609,263	448,375	15	158,646	63,458
Auto (Direct)	29,505		2,065	1,500	3,098,025	1,791,375	15	733,410	293,364
Auto (Indirect)	26,250		1,838	1,500	2,756,250	1,593,750	15	652,500	261,000
Rec. Vehicle	3,229		226	500	113,006	65,344	15	26,753	10,701
COMMERCIAL									
Business Packages: (up to $1mm in gross revenue)	28,114		1,968	7,500	14,759,719	8,534,531	15	3,494,138	1,397,655
Environ. Liab	394			1,500	590,625		10	59,063	23,625
Accounts Receivable	79			15,000	1,181,250		10	118,125	47,250
BANK COVERAGE:									
D&O, E&O, Blanket Bond, et al.				65,000	1,625,000		12	195,000	78,000
TOTAL								$5,775,225	$2,310,090

Notes: 1. This represents the total production of 25 banks based on one "average bank" with $360 million in assets. 2. Year 2 reflects an assumed 5% loan growth rate but no premium increases. 3. Assumes a 85% renewal rate which is according to the Association of Banks in Insurance.

Year 3 PROJECTION OF FIRST THREE YEARS' INCOME – TOTAL FOR ESTIMATED 25 PARTICIPATING BANKS

PRODUCTS	# of Loans	22% Success	7% Success	Avg. Premium	Total Premium	Yr1&2Renew. Prem (Note3)	Comm. %	Total Comm. in $	ProServ 40%
CONSUMER									
Homeowners	12,611	3,027		$500	$1,575,429	$1,575,429	15	$463,317	$185,327
Homeowners Equity Line of Credit	5,926	1,422		500	711,176	$740,346	15	217,728	87,091
Auto (Direct)	31,570		2,841	1,500	4,261,997	3,422,580	15	1,152,687	461,075
Auto (Indirect)	28,088		2,528	1,500	3,791,813	3,045,000	15	1,025,522	410,209
Rec. Vehicle	3,455		311	500	155,464	124,845	15	42,046	16,819
COMMERCIAL									
Business Packages: (up to $1mm in gross revenue)	30,082		2,707	7,500	20,305,156	16,305,975	15	5,491,670	2,196,668
Environ. Liab	421			1,500	631,969		10	63,197	25,279
Accounts Receivable	84			15,000	1,263,938		10	126,394	50,558
BANK COVERAGE:									
D&O, E&O, Blanket Bond, et. al.				65,000	1,625,000		12	195,000	78,000
TOTAL								$8,777,561	$3,511,023

Notes: 1. This represents the total production of 25 banks based on one "average bank" with $360 million in assets. 2. Year 3 reflects an assumed 7% loan growth rate but no premium increases. 3. Assumes a 85% renewal rate which is according to the Association of Banks in Insurance.

PROSERV INSURANCE AGENCY, LLC

ANALYSIS OF INCOME–3-YEAR PRO FORMA INCOME STATEMENT

	Year 1	Year 2	Year 3
Total Commissions (1)	$2,726,250	$5,775,225	$8,777,561
Less Retention to Acordia (2)	(1,635,750)	(3,465,135)	(5,266,538)
ProServ's Gross Revenue	$1,090,500	$2,310,090	$3,511,023
Expenses: (3)			
Leased employees	$45,000	$47,250	$49,615
Rent	13,200	13,200	13,200
Telephone	6,000	6,300	6,620
Legal Fees	36,000	18,000	15,000
Accounting	6,000	6,300	6,620
Travel	6,000	6,300	6,620
Automobile Expenses	12,000	12,600	13,230
Office Supplies	900	950	1,000
Equipment Expense	780	820	860
Miscellaneous and other Expense	1,200	1,300	1,400
ProServ Corp. Management Fee (4)	272,625	577,523	877,756
Total Expenses	$399,705	$690,543	$991,921
Income Before Distributions and Commissions (5) (see p. 9)	690,795	1,619,548	2,519,103
Commissions (6)	588,905	1,460,781	2,302,346
Income Avail. For Distribution (7)	$101,890	$158,767	$216,756

Notes: (1) See attached worksheets for Years 1, 2 & 3 projections. Assumes 25 participating banks (based 25 letters of intent and initial survey). (2) ProServ will have a formal management agreement with Acordia of WV. This relationship will give ProServ Insurance access to major insurance carriers not otherwise available to other banks in WV, Acordia will also operate the Agency's call center. (3) Increases in expenses were analyzed account by account. Rent remained level. Legal fees decreased, and others increased by 5% in Years 2 & 3. (4) Management fee equals 25% of. ProServ Insurance Agency's gross revenue. (5) Priority distributions will be made depending on availability of sufficient income and cash. (6) Commissions are only paid if there is sufficient income and cash available after the priority distributions are made to Members. (7) Total of the 5% distribution and the first year homeowners insurance distribution.

PROSERV INSURANCE AGENCY, LLC
PROPOSED MANAGEMENT ARRANGEMENT

Management of ProServ Insurance Agency, LLC

As the contractual manager of the ProServ Insurance Agency. ProServ Corporation will provide the following services to the owners:

1. Manage and control all business affairs and properties of the agency, to include.

- Supervise operations at the agency office
- Maintain adequate and profession& staffing
- Produce and maintain a budget for the company
- Oversee all accounting and reporting requirements and ensure proper controls.

2. Provide administrative and staff support to the board of directors and the chairman and bring all matters requiring their attention to the board, Provide regular financial statements and present annual budget for approval.

3. Monitor legislative and regulatory matters at state and federal levels pertaining to agency's sale of insurance.

Proposed management fee:

The management fee Will be equal to 25% of ProServ Insurance Agency's gross commissions.

Future adjustments negotiable between PrcServ Corporation and ProServ Insurance Agency, LLC.

PROSERV INSURANCE AGENCY, LLC
DISTRIBUTIONS AND COMMISSIONS

	YEAR 1	YEAR 2	YEAR 3
Income Before Distributions and Commissions (see p.7)	$690,795	$1,619,548	$2,519,103
5% Distribution (1)	$34,540	$80,977	$125,955
First Year Homeowners Insurance Distribution (2)	$67,350	$77,789	$90,801
Total Distributions	$101,890	$158,767	$216,756
Commissions (3)	$588,905	$1,460,781	$2,302,346

(1) five percent (5%) of income before distributions and commissions will be paid to all Members based on each Member's ownership interest.

(2) Income on first year homeowners insurance will be distributed to all Members based on earth Member's ownership interest (restricted by REAPS). Renewals will be treated as commissions and shared amore Member banks as described in Note (3) below,

(3) After calculating the distributions in (1) and (2) above, the remaining "Net Receipts (as defined in the Agency's Operating Agreement) will be paid as commissions to the Member banks in proportion to the commissions produced by each Member bank relative to the total commissions produced by all of the Member banks.

PROSERV INSURANCE AGENCY, LLC
DISTRIBUTIONS AND COMMISSIONS BY MEMBER BANK ASSET SIZE

ASSET SIZE	YEAR 1	YEAR 2	YEAR 3	TOTAL
$0-$50MM				
5% Distribution (1)	$715	$1,675	$2,606	$4,996
Investment				$3,000
Passive Investor Breakeven				2 yrs 3 mos (4)
First Year Homeowners				
Insurance Distribution (2)	1,393	1,609	1,879	4,882
Commissions (3)	11,778	29,216	46,047	87,041
Total	$13,886	$32,500	$50,532	$96,918
Investment				$3,000
Full Participant Breakeven				3 mos (4)
$50-100MM				
5% Distribution (1)	$1,191	$2,792	$4,343	$8,327
Investment				$5,000
Passive Investor Breakeven				2 yrs, 3 mos (4)
First Year Homeowners				
Insurance Distribution (2)	2,322	2,682	3,131	8,136
Commissions (3)	23,556	58,431	92,094	174,081
Total	$27,070	$63,906	$99,568	$190,544
Investment				$5,000
Full Participant Breakeven				2 mos (4)

(1), (2) & (3) are explained on the preceding page. (4) Projected break-even.

PROSERV INSURANCE AGENCY, LLC
DISTRIBUTIONS AND COMMISSIONS BY MEMBER BANK ASSET SIZE

ASSET SIZE	YEAR 1	YEAR 2	YEAR 3	TOTAL
$100-$150MM				
5% Distribution (1)	$1,667	$3,909	$6,081	$11,657
Investment				$7,000
Passive Investor Breakeven				2 yrs, 3 mos (4)
First Year Homeowners				
Insurance Distribution (2)	3,251	3,755	4,384	11,390
Commissions (3)	20,612	51,127	80,582	152,321
Total	$25,531	$58,792	$91,046	$175,369
Investment				$7,000
Full Participant Breakeven				3 mos (4)
$150+MM				
5% Distribution (1)	$2,382	$5,585	$8,686	$16,653
Investment				$10,000
Passive Investor Breakeven				2 yrs. 3 mos (4)
First Year Homeowners				
Insurance Distribution (2)	4,645	5,365	6,262	16,272
Commissions (3)	20,612	51,127	80,582	152,321
Total	$27,639	$62,077	$95,531	$185,246
Investment				$10,000
Full Participant Breakeven				4 mos (4)

(1), (2) & (3) are explained on the preceding page. (4) Projected break-even.

DRAFT 5/15/00

MANAGEMENT SERVICES AGREEMENT

This Agreement is made by and between PROSERV INSURANCE AGENCY. LLC (Agency) and the West Virginia Bankers Association Products and Services Corporation (ProServ), effective _____, 2000.

RECITALS

A. Agency is a limited liability company chartered to act as an insurance agency under West Virginia law.

B. Agency desires to contract the services of ProServ to perform various operational management. administrative. and other services for Agency.

C. ProServ is a West Virginia corporation desiring to provide such services to Agency.

NOW THEREFORE, in consideration of the mutual promises and covenants herein contained and other good and valuable consideration, the sufficiency of which is acknowledged, the parties agree as follows:

1. Description of Service's and Fees. ProServ will provide the following described services to Agency and Agency agrees to pay ProServ the following management fee for these services.

a. Beginning _____, 2000 and continuing for a period of one year thereafter (the "Initial Term"), the management fee shall be twenty-five percent (25%) of the Agency's gross revenue. For this purpose, gross revenue shall include all commissions and other revenue earned by the Agency, less any amounts which Acordia of West Virginia, Inc. ("Acordia") is entitled to retain pursuant to the Services Agreement between Agency, ProServ and Acordia. Agency shall pay this management fee monthly, on or before the fifteen day of each month,

based upon the Agency's gross revenues for the immediately preceding month. Any future adjustment to this fee after the Initial Term, shall be agreed upon in writing by Agency and ProServ; provided, however, if no such adjustment is made, the management fee after the Initial Term shall continue to be twenty-five percent (25%) of the Agency's gross revenue.

b. For this fee, ProServ will provide Agency the following:

1. Manage and control all business affairs and operations of the Agency, including without limitation, the following: (a) supervise operations at the Agency office; (b) arrange for adequate and professional staffing; (c) arrange for accounting and legal support; (d) produce and maintain a budge for the Agency; and (e) oversee all accounting and reporting requirements and ensure proper fiscal controls.

2. Ensure that all insurance licensing and other regulatory requirements are satisfied.

3. Monitor legislative, and regulatory matters at state and federal levels pertaining to Agency's sale or insurance.

4. Handle distribution of income and commissions and other payments to banks that are members of Agency.

5. Coordinate all Agency meetings.

6. Facilitate participation by banks that are members of Agency in significant decisions affecting Agency.

c. Expenses. Agency will be responsible for all expenses in connection with operation of its business. These expenses include, but are not limited to, employment costs, rent, utilities, postage, fag; expenses, office supplies, telephone communications, travel, equipment, taxes, professional advisor fees, and any other cost incurred by Agency or ProServ in connection with Agency's business.

2. Term. The Initial Term of his Agreement shall begin _____, and continue for a period of one year thereafter. At the end of the Initial Term, this Agreement shall automatically renew for additional one-year periods unless written notice of termination is given to the other party at least one-hundred twenty (120) days prior to the end of the Initial erm or any subsequent one-year period, unless terminated under provisions of Paragraph 6 below.

3. Termination.

a. This Agreement may be terminated by either party prior to the initial Term, or any one-year extension period, upon the expiration of one-hundred twenty days (120) after the receipt of written notice by the terminating party that the other party is guilty of gross misconduct, has become insolvent, has been adjudged bankrupt, or has violated the terms of this Agreement. However, if the defaulting party cures the default within the one-hundred twenty day (120) period, the Agreement shall continue in force and effect.

b. This Agreement may be terminated by the mutual written consent of both parties at any time.

4. Responsibilities of Parties. ProServ shall have full authority to enter into contracts and to engage in all acts and activities necessary to carry out the business, operations and functions of Agency and the services

set forth in Paragraph 2 above, All such business, programs and functions shall be conducted by ProServ on behalf of and in the name of Agency.

5. Indemnification and Hold Harmless. Each party shall indemnify, defend and hold harmless the other and each of the other's respective officers, directors and employees or agents from any and all claims, lawsuits, settlements, judgments, cost, penalties, liabilities, damages and expenses actually incurred, including reasonable attorneys' fees, resulting from or arising out of or the indemnifying party's (i) breach of any representation, covenant or agreement set forth in this Agreement, or (ii) the negligence or willful misconduct of the indemnifying party, it; officers, directors, employees or agents.

6. Notices. Any notice that may be required by the terms of this Agreement or that any party may desire to serve upon the other shall be in writing and personally delivered, or deposited in a regularly maintained office or branch of the U.S. Postal Service, certified or registered mail, to the principal office of the party receiving the notice.

7. Privacy Provisions ProServ and Agency agree to comply with the Gramm-Leach-Bliley Act of 1999 (the "Act") in ensuring that all privacy obligations imposed by the Act with reset to the services provided pursuant to this Agreement are met.

8. Confidentiality. The parties to this Agreement each recognize that, in performing their respective obligations hereunder, each will obtain confidential information with respect to the customers and/or business affairs of the other. The parties each acknowledge their obligation to maintain the

confidentiality of such information. This obligation shall extend but shall not be limited to the following:

(a) To take all steps reasonably available to them to assure that the directors, officers, employees, agents and representatives of each and of their corporate affiliates shall keep information obtained from the other or with respect to customers of the insurance products sold hereunder confidential at all times so that such information shall be available only to those persons requiring such information in the conduct of their duties and such persons shall be instructed as to their obligations to maintain the confidentiality hereof;

(b) In the performance of their obligations under this Agreement, each may obtain information concerning the assets, business and operations of the other, including proprietary information concerning business practices and strategies, and that the party acquiring such information shall use it only during the term of this Agreement and in connection with the activities contemplated hereby and that neither party shall be entitled to use information obtained with respect to the other or the activities of the other in connection with any activities not contemplated by this Agreement;

(c) In the event this Agreement is terminated for any reason, each of the parties shall return to the others any information in physical or electronic form provided by such other party or relating to its business. and shall not thereafter use such information in the conduct of subsequent business activities, except as otherwise aged in writing;

(d) That money damages would not be sufficient remedy for any breach of this duty of confidentiality and, accordingly, that any party shall be entitled to apply to a court for equitable relief against the other party,

including injunctive relief and specific performance, in the event of a breach of this Paragraph. Such remedy shall not be deemed to be an exclusive remedy but shall be in addition to any other remedies, including money damages, available by law or equity; and

(e) That the provisions of this Paragraph shall survive termination of this Agreement.

9. Miscellaneous.

a. This Agreement constitutes the entire Agreement of the parties and may not be modified or amended except by written instrument signed by the parties hereto.

b. In the event that any portion of this Agreement shall be held to be invalid or unenforceable, the remaining provisions hereof shall remain in full force and effect.

c. Any provision in this Agreement may be (i) waived by the party benefitted by the provision to the extent permitted by applicable law; or (ii) amended or modified at any time, by an agreement in writing between the parties hereto executed in the same manner as this Agreement; provided, however, that no deny or failure by any party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right,

d. This Agreement shall be governed by and interpreted in accordance with the laws of the State of West Virginia.

e. The agreements and convents contained in this Agreement shall survive the termination of this Agreement.

f. A party hereto may not assign any of its rights or obligations under this Agreement to any other person without the prior written consent of the other pay.

IN WITNESS WHEREOF, the undersigned duty authorized officers or representatives enter in this Agreement this the _____day of_____,2000.

WEST VIRGINIA BANKERS ASSOCIATION PRODUCTS & SERVICES CORPORATION

By: _____

Its:_____

PROSERV INSURANCE AGENCY, LLC

By: _____

Its:_____

PROSERV INSURANCE AGENCY, LLC

PARTIPATING BANKS/HOLDING COMPANIES

As of

May 3, 2000

Bank of Gassaway
Bank of Mingo
Capon Valley Bank
Citizens National Bank
Clay County Bank
Doolin Security Savings Bank, FSB
Fayette County National Bank
First Exchange Bank
The First National Bank
The First National Bank of Romney
Freedom Bancshares, Inc.
Guaranty Bank and Trust Company
Grant County Bank
Jefferson Security Bank
Logan Bank & Trust
The Monongahela Valley Bank, Inc.
Northern Hancock Bank & Trust Company
Pioneer Community Bank, Inc.
The Poca Valley Bank
Traders Bankshares, Inc.
United National Bank
Whitesville State Bank
City National Bank of West Virginia
Pendleton County Bank

February 13, 1997

The Office of the Comptroller of the Currency
Communications Division
250 E Street, SW
Third Floor
Washington, D.C. 20219

Re: Comments on Docket No. 97-01 Relating to the Determination of preemption of Rhode Island Consumer Protection Law

Dear Comptroller:

Consumer Federation of America, Consumers Union and U.S. Public Interest Research Group (U.S. PIRG) together submit these comments relating to the determination of whether any provisions of a Rhode Island consumer protection law, "Financial Institutions Insurance Sales Act" R.I. Gen. Laws §27-58-1 *et.seq.*, (the Rhode Island law), are preempted by federal law. We submit that there is no basis to preempt the Rhode Island law because (1) the law is a consumer protection law that provides essential safeguards; (2) there is no federal law that preempts the Rhode Island law; and (3) the Rhode Island law does not discriminate against national banks. Further, the provisions of the Rhode Island law neither prevent not significantly interfere with the ability of financial institutions to exercise their authority to sell insurance. And, finally, viewed as an insurance consumer protection law that regulates how the business of insurance is conducted, the McCarran-Ferguson Act provides that all who are engaged in such business be subject to the laws of the states.

The Rhode Island Law Provides Needed and Essential Safeguards for Consumers Purchasing Insurance through a Financial Institution.

Retail sales of insurance is a rapidly growing business for financial institutions. According to the most recent survey of banks conducted by the Association of Banks-in-Insurance (ABI), insurance premiums collected by banks in 1995 totaled an estimated $16.3 billion. And, ABI estimates that banks representing 70% of the deposit base now are engaged in the business of insurance.

This rapid expansion of insurance business is a result of the expansion of banks' authority to sell insurance. The Office of the Comptroller of the Currency ("OCC") has authorized national banks to sell all insurance throughout the country, as long as the insurance operations are administered out of branches in towns of 5,000 or less. Through "wild card" and other state laws, many states allow the same kinds of activities for state-chartered banks. In *Barnett Bank of Marion County N.A. v. Nelson, Florida Insurance Commissioner ("Barnett")*, the Supreme Court opened further the door to banks by striking down a state law that prohibited banks from affiliating with insurance agencies, holding that such law is preempted by the National Bank Act (12 U.S.C. §92) because it prevented banks from exercising the power granted to them by section 92. The Court made clear, however, that states do have the power to regulate national banks in this area.

This expansion of bank insurance activity has occurred, for the most part, in the absence of a regulatory framework to ensure consumers are protected against unfair and deceptive practices. And the need for such safeguards is clear. Banks, as depository institutions backed by federal government and as lenders, play a distinct and trusted role in the financial marketplace. This role is distinct from that of insurance agencies whose primary function is to sell insurance and not deposit or credit services. In order to ensure that banks do not use their status as federally insured depository and lending institutions to participate in deceptive and anti-

competitive practices harmful to consumers, consumer safeguards are needed. The Rhode Island law is a positive step torward filling the regulatory void in retail sales activities conducted by financial institutions.

Study after study reveals that many banks are falling to inform consumers that nonbanking products such as insurance are not insured by the FDIC or that such products are subject to risk.

- A survey conducted for AARP and the North American Securities Administration Association (NASAA) in 1994 found that fewer than one in five bank customers understood that products such as mutual funds and annuities are uninsured.
- In the March 1994 issue of Consumer Reports, Consumers Union reported on the results of an undercover investigation we conducted of 40 bank salespeople from different parts of the country. Only 16 of the 40 salespersons contacted even bothered to ask questions that would have indicated what products were suitable for the investigator.
- A May 1996 study initiated by the FDIC found that more than one-fourth of the banks surveyed failed to tell on-site customers that products are not insured and 55 percent failed to inform telephone customers.

Banks also use their position as lenders to coerce consumers into purchasing products they do not need or want. For example, a consumer activist in Colorado attempted to refinance his automobile from a lease to a purchase financed through his bank. Although he expressly indicated from the start that he did not want or need the insurance, when he showed up at the bank for closing both credit life and disability insurance had been added in the financing. He was told that closing could be delayed for days if he insisted on the elimination of the credit insurance. While confusing and

deceptive practices have already occurred in bank sales, as retail sales activity of banks increase, so does the potential for more problems.

The Rhode Island law addresses some of the problem and provides consumer safeguards. The law helps prevent coercion by prohibiting banks from requiring or implying that the purchase of insurance is required or related to the extension of credit or other service the bank provides. By requiring physical separation of activities, separate transaction documents and employee functions, the law addresses the confusion over whether the insurance products are insured and the pressure tactics used by employees to push consumers to insurance sales. Since the law is clearly designed to protect consumers from unfair and deceptive practices, there is no doubt it is a consumer protection law. Rather than being a candidate for preemption, however, we believe the law should contain stronger consumer protections.

There is No-Basis for the OCC to Make a Determination that Federal Law Preempts the Rhode Island Consumer Protection Law

The authority and legitimate interest of states to protect their consumers has long been recognized. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 ("Riegle-Neal") represents Congress' most recent expression of the importance of this authority vis-à-vis national banks. In the Conference Report on Riegle-Neal, the general principles of federal preemption of State law were stated as follows: "Generally, State law applies to national banks unless the State law is in direct conflict with the Federal law, Federal law is so comprehensive as to evidence Congressional intent to occupy a given field, or the State law stands as an obstacle to the accomplishment of the full purposes and objectives of the Federal law." (Riegle-Neal Conf. Rep., August 3, 1994, at 53)

In Riegle-Neal, Congress was particularly concerned about preemption attacks on four areas of State law and carved out these areas to ensure their maximum applicability to national bank branches—community reinvestment, consumer protection, fair lending, and the establishment of intrastate branching. There are only two exceptions to the general requirement of the applicability to national banks of these four areas of State laws. (12 U.S.C. §36(f)). First, when Federal law preempts the application of the State law to a national bank. Second, when the OCC determines that the application of the State law would have a discriminatory effect on the out-of-state branch of the national bank as compared with its effect on a branch of a state bank.

The Conference Report makes clear that Congress does not favor preempting state laws, particularly when the laws address consumer protection, community reinvestment, fair lending and the establishment of the intrastate branches. In fact, due to their concern about the manner in which the OCC had applied preemption principles, the Conferees highlighted a few examples in which they found the OCC's decisions to preempt State law to be "inappropriately aggressive" and unwarranted. (Conf. Rep. At 53). Stressing the Congressional preference against preemption and Conferees stated that agencies should issue "opinion letters and interpretive rules concluding that Federal law preempts State law only when the agency has determined that the Federal policy interest in preemption is clear." (Conf. Rep. At 54) (emphasis added). In discussing the process for agency preemption determination, the Conferees clarified that such process ". . . is intended to help focus any administrative preemption analysis and to help ensure that an agency only makes a preemption determination when the legal basis is compelling and the Federal policy interest is clear." (Conf. Rep. At 55) (emphasis added).

Applying the Riegle-Neal provision on the applicability of State law, there can be no finding other than that Federal law does not preempt the application of these provisions to national banks. First, there is no federal law that preempts the State law. No federal law is in direct conflict with the Rhode Island law (see below). Federal law is not comprehensive in this area. There are few consumer protections for bank insurance sales activities in Federal law. In fact, the national bank regulator has not prescribed any regulation that provide consumer safeguards. And, the State law does not present obstacles to banks' authority to sell insurance as permitted by Federal law. Second, the law applies equally to all financial institutions in the state, whether they are national bank branches or State-chartered institutions. See R.I. Gen. Laws §27-58-3 for definition of "financial institution."

The Riegle-Neal Act, as the most recent expression of Congressional intent on preemption of state consumer protection laws, provides the law under which the OCC is directed to make its determination about whether the Rhode Island law is preempted. (The OCC followed the notice procedures as provided under Riegle-Neal). Both the language and the Congressional intent are clear indicators of Congress' preference against preemption. Since the Rhode Island law is a consumer protection law and fails to fall within either exception to the Riegle-Neal general prescription against preemption, the OCC should not assert preemption.

The State Law Does Not Prevent ofr Significantly Interfere with the Ability of Banks to Sell Insurance.

The Riegle-Neal law should be applied by OCC to make its preemption determination. However, if the OCC chooses not to follow the clear mandate from Congress as manifested in Riegle-Neal and employs the *Barnett* standard instead, there still should be no finding of preemption. In the *Barnett*

decision, the Court confirmed that national banks are subject to state regulation where such regulation does not "prevent or significantly interfere with the national bank's exercise of its powers." *(Barnett*, at p.7) Provisions of the Rhode Island law provide protections for consumers without preventing or significantly interfering with the ability of banks to sell insurance (see discussion below). Therefore, the State law should apply to national banks.

The Rhode Island law protects consumers by ensuring that the bank cannot use the fact that it is federally insured and has the power to give credit to confuse, coerce or otherwise pressure consumers into purchasing insurance from the institution. Since those entities selling insurance outside the financial institution setting are not federally-insured businesses that can make loans, the law helps to create an unfair advantage that has the potential to harm consumers. In providing such protections, the law promotes competition by preventing anti-competitive behavior and protects consumers from unfair and deceptive practices. The only activity the law prevents or significantly interferes with is the ability of banks to use their status as insured depository institutions and lenders to pressure insurance sales on their customers. The OCC, as national bank regulator, should be extremely concerned about a bank using such status to participate in unfair and deceptive practices and welcome such protections.

As we previously stated, we not only believe the law should not be preempted but rather should go further to protect consumers. For example, we believe a stronger anti-coercion rule is needed that would allow sales of insurance after the loan decision has been made. Second, credit insurance, forced-placed coverage and private mortgage insurance are not included in the definition of "insurance" and they should be. Third, the definition of non-public information does not include cutomer names, addresses, and telephone numbers, which we believe should not be used or

disclosed without the prior affirmative consent of the consumer.

The Provisions of the Rhode Island Law are not Preempted by Federal Law and do not Prevent or Significantly Interfere with the Bank's Ability to Sell Insurance.

1. Section 6 helps prevent coercion and does not conflict with the anti-tying provisions of the Bank Holding Company Act or prevent the bank from even mentioning insurance: Section 6 of the Rhode Island law prohibits the bank from requiring or implying that the consumer has to purchase insurance from the financial institution or any particular insurance producer as a condition of the loan. The Bank Holding Company Act ("BHCA") prohibits a bank from conditioning the extension of credit or other banking service on obtaining another product, service or benefit. The Rhode Island law provides greater anti-tying protection than the BHCA anti-tying and is in no way in conflict with the BHCA. Therefore, the provision is not preempted. Further, if the Rhode Island law prohibited sales of insurance by the institution until after the loan approval, a protection we believe is needed, the BHCA anti-tying provisions would not conflict with such requirement because it merely prohibits tying, it does not direct the manner in which insurance sales should be made.

Section 6 does not, as the Requester asserts, prohibit the bank from requiring insurance as a condition of the loan or prohibit the bank from mentioning to consumers that insurance is available from the bank. The intent is clear: to ensure that the financial institution does not coerce or pressure consumers into purchasing insurance from it or its specified insurer as a condition of the loan. The proposed regulation states that banks cannot require that the consumer purchase insurance from them or prohibit the consumer from purchasing from a competitor. The law is in no way significantly interferes with the ability of the bank to sell

insurance, only with the bank's ability to force the sale of its insurance onto consumers, an anti-competitive, coercive practice.

2. Sections 8 and 12 help prevent coercive bank practices and consumer confusion about the type of products being sold by the bank. Several studies, including a recent one conducted by the FDIC, reveal that banks continually fail to inform consumers that non-banking products are not insured by the federal government or guaranteed by the bank. Consumers purchasing these products who are led to believe that they are federally insured may be basing their purchase decision on such protection rather than the costs and benefits of the policy. Such confusion is detrimental to individual consumers and to the promotion of a competitive market. In OCC's guidance to banks on insurance sales, it acknowledges the need to prevent customer confusion and the importance of using a physically distinct area of the bank to conduct insurance sales.

The requirement fpr physical separation and independent employee functions represent important consumer safeguards that are positive steps to help consumers distinguish between traditional banking services and the sale of insurance products that are not federally insured or obligations of the bank. Equally as important, these requirements help prevent the possible coercion by the lending officers when consumers anxiously await loan approval decisions. There is no Federal law that preempts either requirement. The requester argues that the employee rule discriminates against national banks but the language of the law makes clear that such requirement applies to all financial institutions operating in the state. Since no Federal law preempts application of this provision to national banks and under the Rhode Island law the provisions apply equally to all financial institutions operating in the state, regardless of charter, the law is not subject to a finding a preemption.

The Requester's contention that such requirements would prevent banks from selling insurance is not warranted. The physical separation requirement does not mean a separate building as specifically stated in the law. The law specifies that implementing regulations will clarify the scope of the separation agreement. In fact, the draft of the regulations make it clear that this requirement will not present any inconvenience to the small banks because a great deal of latitude is allowed, including the use of planters as separating devices and taking into account single meeting room situations. And, under the definition of "solicitation" in the draft regulations, employees would be able to make referrals and point marketing materials. There is no evidence that either requirement will significantly interfere with banks' ability to sell insurance. However, if there are small banks that cannot sell insurance due to the separation of employee function requirement, the Rhode Island commissioner should take that into account in developing the regulations.

3. By requiring the separation of the loan and insurance documents, section 11 helps prevent the coercion of loan applicants and confusion about how insurance is paid. Banks should not be able to combine the loan documents with the insurance and include the insurance in the financing without the customer's consent. Obviosly, allowing such combination enables a bank to coerce consumers into purchasing the insurance more easily, to deceive consumers through the fine print, and to add to the costs to consumers by forcing the financing of premiums. When purchased separately, banks cannot so easily manipulate the sales and financing conditions of the transaction. Consumers should have the right to decide how they want to pay for the premiums and should understand the extra costs associated with financing the premiums. (Note: Although we do not agree with such exemption, credit, forced-placed and private mortgage insurance are all exempted from the Rhode Island law's requirement.)

There is no Federal law that applies to national banks that preempts the consumer safeguards provided by section 11. The Sate law applies to the same extent to national banks as it does to Start-chartered banks. Therefore, these provisions are not preempted. Further, such requirement do not significantly interfere with the bank's ability to sell insurance—they help protect against coercion and slipping coverage onto the loan as well as promote consumer choice and understanding about the method of payment.

4. Section 10 helps protect the privacy expectations of consumers: When customers provide information to a bank, there is an expectation of privacy about that information, even the fact that they may bank with such institution. Section 10 protects that privacy by not allowing the financial institution to disclose or use that information to market insurance. There is no Federal law that preempts this provision specifically as it applies to national banks. On the other hand, the Fair Credit Reporting Act ("FCRA") has provisions relating to the sharing of information among affiliates and FCRA amendments specifically prohibit states from enacting laws on the same subject for 7 years. To the extent section 10 applies to sharing information among corporate affiliates, then the temporary FCRA preemption provisions would probably invalidate their application. However, section 10 applies way beyond the sharing of information among affiliates. By limiting the temporary preemption language to affiliate sharing circumstance, the new FCRA amendments indicated a Congressional intent not to preempt state privacy laws on the internal use of information or the distribution of such information to non-affiliated third parties.

The draft regulations provide that there is no prohibition against the use of information if the customer consents to such use in writing. Although we believe the definition of "non-public information" is overly broad (and the consumer should have the right to determine whether the bank can use

his/her name, address and telephone number), the fact that customer names and addresses are not included in the definition allows banks wide reign in marketing their insurance to their customers.

Conclusion

As we have stated, the OCC should not assert preemption if Rhode Island law as there is no basis for such preemption. States have a legitimate interest in protecting their consumers against deceptive, unfair and anti-competitive practices of any financial institutions operating within their borders. We urge the OCC to err on the side of protecting consumers by not preempting the Rhode Island law.

Sincerely,

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/s/ Mary Griffin
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No. 02-1620

In the Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC., PETITIONERS

v.

JOHN D. HAWKE, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners are proper parties to invoke this Court's certiorari jurisdiction to seek review of the merits of the decision of the court of appeals.

2. Whether federal law preempts certain West Virginia statutes to the extent that they prohibit national bank employees with lending responsibilities from soliciting the sale of insurance, prohibit national bank employees from making an insurance-related referral or solicitation of a loan applicant until after the bank has approved the loan, and require national banks to sell insurance products in an area that is separate and distinct from the bank's lending and deposit-taking activities.

PARTIES TO THE PROCEEDINGS BELOW

The petition does not provide a complete list of all parties to the proceedings in the court whose judgment is sought to be reviewed as required by Rule 14.1(b) of the Rules of this Court. The petition for review below was filed by Jane L. Cline, in her capacity as the Insurance Commissioner of the State of West Virginia, and by the State of West Virginia. Neither the Commissioner nor West Virginia has petitioned for this Court's review of the judgment below or given notice that they join in this petition for certiorari.

Petitioners Independent Insurance Agents and Brokers of America, Inc., and National Association of Professional Insurance Agents, Inc., are trade associations of insurance agents that appeared below as intervenors, over respondents' objection.

Respondents below were John D. Hawke, Jr., in his capacity as Comptroller of the Currency of the United States, and the Office of the Comptroller of the Currency (OCC), a bureau within the Treasury Department charged with the administration of the National Bank Act, 12 U.S.C. 21 *et seq.*, and other banking laws, including 12 U.S.C. 92. The OCC has broad authority over the chartering, supervision, and regulation of virtually every aspect of banks organized under the National Bank Act, including the authority to determine the nature and scope of statutorily authorized banking powers.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is not published in the *Federal Reporter* but is reprinted in 51 Fed. Appx. 392. The opinion letter of the Office of the Comptroller of the Currency (Pet. App. 30a-79a) is published at 66 Fed. Reg. 51,502.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2002. A petition for rehearing was denied on February 21, 2003 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on May 6, 2003. The jurisdiction of this Court is invoked under 28

U.S.C. 1254(1). In respondents' view, however, which is set forth more fully below, the Court lacks jurisdiction, because the court of appeals erred in permitting petitioners to intervene, and thus petitioners are not "part[ies]" within the meaning of Section 1254(1).

STATEMENT

1. Since 1916, national banks located in and doing business in towns with 5000 or fewer inhabitants have been authorized to act as insurance agents. 12 U.S.C. 92. Until 1999, national banks were otherwise authorized to engage in insurance sales only to the extent that such sales are part of or incidental to the business of banking. See 12 U.S.C. 24 (Seventh). In 1999, however, Congress enacted the Gramm-Leach-Bliley Act (GLBA), legislation that removed the historical barriers between the banking, insurance, and securities industries, and expanded the authority of national banks and their subsidiaries to sell insurance. See Pub. L. No. 106-102, 113 Stat. 1338.

Section 104(d)(2)(A) of the GLBA sets forth a general rule that limits state restrictions on insurance sales by depository institutions, including national banks. That provision states that, "[i]n accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25 (1996), no State may * * * prevent or significantly interfere with the ability of a depository institution * * * to engage * * * in any insurance sales, solicitation, or crossmarketing activity." 15 U.S.C. 6701(d)(2)(A).

Section 304(a) of the GLBA provides for judicial resolution of controversies about the preemption of state insurance laws that arise between federal regulators, charged with supervising depository institu-

tions, and state regulators, who have traditionally overseen insurance sales activities. That provision states that:

> In the case of a regulatory conflict between a State insurance regulator and a Federal regulator regarding insurance issues, including whether a State law, rule, regulation, order, or interpretation regarding any insurance sales or solicitation activity is properly treated as preempted under Federal law, the Federal or State regulator may seek expedited judicial review of such determination by the United States Court of Appeals for the Circuit in which the State is located or in the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in such court.

15 U.S.C. 6714(a).

2. In May 2000, the West Virginia Bankers Association asked the OCC for guidance on whether, in the OCC's opinion, certain provisions of the West Virginia Insurance Sales Consumer Protection Act, W. Va. Code §§ 33-11A-1 *et seq.* (2000), are preempted by federal law to the extent that they purport to apply to national banks. In response, the OCC published a notice in the Federal Register seeking public comment on whether federal law preempts the provisions. See 65 Fed. Reg. 35,420 (2000). Among the comments that the OCC received was a letter from the West Virginia Insurance Commissioner. The Commissioner expressed the view that federal law does not preempt four of the state provisions. The Commissioner also acknowledged that federal law does preempt the other three provisions at issue by noting his support for pending state legislation that would have repealed those provisions because of their preempted status. See Pet. App. 3a; C.A. App. 17-

28. Another comment letter, submitted on behalf of three insurance agent trade associations, including petitioners, argued that none of the provisions is preempted. Pet. App. 108a-178a.

On September 24, 2001, after reviewing the comments it had received, the OCC issued an opinion letter, which the OCC published in the Federal Register. 66 Fed. Reg. 51,502 (*reprinted in* Pet. App. 30a-79a). In determining the existence and degree of conflict between federal law authorizing insurance sales by national banks and state restrictions upon such activities, the OCC relied upon its long experience in overseeing national bank insurance sales activities. The OCC expressed the opinion that, of the seven state statutory provisions that it had analyzed, federal law did not preempt two provisions, preempted one provision only in part, and preempted four provisions in full. See Pet. App. 31a-32a. Three of the four provisions that the OCC found preempted were provisions that the West Virginia Commissioner had agreed were preempted. See C.A. App. 17, 25-28. It is those three provisions that are the subject of the petition before this Court. See Pet. 11-12.

3. a. Almost a year later, West Virginia Insurance Commissioner Cline (a successor to the Commissioner who had filed the comments with the OCC) filed a petition for review of the OCC's preemption opinion in the United States Court of Appeals for the Fourth Circuit. The Commissioner invoked the court of appeals' jurisdiction under Section 304(a) of the GLBA, which, as described above, authorizes the filing of a petition for review by a "Federal or State regulator" in cases of "regulatory conflict" between a state insurance regulator and a federal regulator regarding, among other things, whether federal law preempts state statutes

restricting insurance sales and solicitation activity. 15 U.S.C. 6714(a). After the petition was filed, petitioners, two trade associations of insurance agents, moved to intervene in the case. The OCC opposed the intervention because the only parties permitted by the text of the jurisdictional statute are federal regulators, such as the OCC, and state regulators, such as the Commissioner. The court of appeals granted petitioners' motion to intervene.

b. In an unpublished decision, the court of appeals dismissed the petition for review. Pet. App. 1a-19a. Although each member of the panel issued a separate opinion, two of the three judges agreed that federal law preempts the provisions of West Virginia law that the OCC had identified as preempted. *Id.* at 1a-9a (opinion of Gregory, J.); *id.* at 10a (Luttig, J., concurring in the judgment).

In his opinion, Judge Gregory first addressed whether the court had jurisdiction to resolve the preemption question. Pet. App. 3a-4a. He concluded that, under the circumstances of this case, the court had jurisdiction under Article III of the Constitution to review the dispute between the OCC and the West Virginia Insurance Commissioner. *Id.* at 4a. Judge Gregory reasoned that the OCC's opinion letter causes West Virginia an injury in fact because it is likely to encourage national banks to engage in activities that conflict with West Virginia's laws and thereby to undermine West Virginia's efforts to ensure compliance with those laws. *Ibid.*

On the merits, Judge Gregory rejected petitioners' and intervenors' arguments that the OCC lacked authority to issue the preemption opinion, and determined that the OCC has express authority to interpret the banking laws that empower national banks to

engage in insurance sales, solicitation and cross-marketing activity, and implicit authority to interpret provisions of the GLBA that relate to national banks. Pet. App. 5a-6a. Judge Gregory next concluded that, because the OCC does not have regulation writing authority under the GLBA, the OCC's preemption opinion letter is not entitled to deference of the kind described in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but rather is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), "to the extent that" it has the "power to persuade." Pet. App. 7a (quoting *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000)). Analyzing the substance of the OCC's preemption opinion, Judge Gregory concluded that the OCC had given the preemption issues "thorough" consideration, that the OCC's reasoning that certain of the West Virginia laws would "prevent or significantly interfere" with national bank insurance sales activity was "valid," and that the OCC's interpretation is therefore entitled to *Skidmore* deference because of its "persuasiveness." *Id.* at 8a-9a.

Judge Luttig concurred in the judgment. He agreed that federal law preempted the West Virginia provisions at issue, for the reasons stated in the OCC opinion letter and articulated by counsel for the OCC during oral argument. Pet. App. 10a.

Judge King dissented. Pet. App. 10a-19a. In his view, the court lacked jurisdiction to determine whether the West Virginia statutes are preempted. *Ibid.* Judge King reasoned that, because the OCC's preemption opinion is not entitled to *Chevron* deference and thus "has no legal effect," the regulatory conflict between the OCC and West Virginia does not present a

"case or controversy," as required by Article III of the Constitution. *Id.* at 12a-14a.

Petitioners filed a petition for rehearing or rehearing en banc. In response to the court's direction that the other parties respond to the petition, the Commissioner stated that she neither joined nor opposed the rehearing petition and would "remain silent." See Answer of Pet'rs in Resp. to Intervenors' Pet. for Rehearing or Rehearing En Banc 2.

ARGUMENT

Petitioners are not proper parties to invoke this Court's certiorari jurisdiction to seek review of the merits of the decision below. Moreover, the unpublished decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. Because petitioners' intervention in this case was impermissible under Section 304(a) of the GLBA, 15 U.S.C. 6714(a), they are not proper parties to the underlying case, and this Court lacks jurisdiction to review the merits of the decision below at their behest. Only a person who is properly a "party" to the case in the court of appeals may invoke this Court's certiorari jurisdiction to review the merits of the court of appeals' decision. See 28 U.S.C. 1254(1). The decision of the court of appeals granting or denying a motion to intervene does not conclusively establish whether the person who sought intervention is a "party" authorized to seek review of the merits of the court of appeals' decision. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 30, 34 (1993) (per curiam) (unless Court reviews and reverses order denying intervention, the party denied intervention

cannot obtain review under 28 U.S.C. 1254(1) of the issues presented in the underlying case); *International Union, United Automobile Workers* v. *Scofield*, 382 U.S. 205, 209 (1965) (Court has certiorari jurisdiction if it determines that petitioner was improperly denied intervention by court of appeals). Just as a person who was denied intervention is properly a "party" entitled to seek this Court's review of the merits of the underlying case if the denial of intervention was erroneous, a person who was granted intervention is not properly a "party" entitled to seek this Court's review of the underlying merits if the grant of intervention was erroneous. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 71 (1986) (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and concurring in the judgment) (party who was not a proper intervenor in the court of appeals is not a "party" authorized to appeal under 28 U.S.C. 1254(2)).

That is the situation here. Section 304(a) of the GLBA specifies that the only entity that may seek judicial review under the expedited mechanism that it creates is a "Federal or State regulator." 15 U.S.C. 6714(a). Intervention by individually regulated entities or trade associations is not consistent with that narrowly limited procedure. The court of appeals' decision permitting petitioners to intervene as parties in the case, which the OCC opposed, was therefore incorrect. Because petitioners were not proper parties in the court of appeals, they are not authorized by 28 U.S.C. 1254(1) to invoke this Court's certiorari jurisdiction to review the merits of the case.

b. Even if petitioners could establish that they are "part[ies]" within the meaning of 28 U.S.C. 1254(1), their petition would not be an appropriate vehicle to resolve either the preemption question that they seek

to raise or the justiciability question that divided the court below. Section 304(a) of the GLBA creates a narrowly tailored judicial review mechanism to resolve "a regulatory conflict between a State insurance regulator and a Federal regulator." 15 U.S.C. 6714(a). If this Court is going to review either that judicial review mechanism or a substantive determination yielded by that mechanism, the Court should do so in a case that actually presents a regulatory dispute between the statutorily specified parties. Because the West Virginia Insurance Commissioner has not sought review of the judgment below, this is not such a case.

The West Virginia Commissioner's failure to seek this Court's review makes this case an inappropriate vehicle to address the issues raised by petitioners for still another reason: The Court would have to resolve a difficult standing question before it could reach the merits of the case. "[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond*, 476 U.S. at 68. It is unclear whether petitioners could establish standing because West Virginia has apparently acquiesced in the decision below.

To establish Article III standing, petitioners would have to demonstrate not only that they are suffering injury in fact, but also that the injury is fairly traceable to respondents' actions and is likely to be redressed by a decision in petitioners' favor. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). Petitioners, trade associations representing independent insurance agents, contend that they are suffering injury because the OCC's preemption opinion encourages

national banks to engage in insurance sales activities in which they are prohibited from engaging by the West Virginia laws that the court of appeals found to be preempted. See Supp. Br. of Intervenors 2-3. But in light of the West Virginia Insurance Commissioner's apparent acquiescence in the view that the relevant state law provisions are preempted (*i.e.*, unconstitutional by virtue of the Supremacy Clause), petitioners might have difficulty establishing that a favorable decision would result in enforcement of the statute to their benefit, and therefore that their injury is redressable. As this Court noted in *Diamond*, in holding that the intervenor in that case lacked standing to appeal, a State's failure to seek this Court's review of a lower court's decision "indicate[s] its acceptance of that decision, and its lack of interest in defending its own statute[s]." *Diamond*, 476 U.S. at 63. Accordingly, this Court should deny the petition for a writ of certiorari.[1]

2. The Court should also deny the petition because the decision below is correct and does not conflict with any decision of this Court or of another court of appeals.

a. The court of appeals correctly held that the three West Virginia statutes at issue in the petition are preempted to the extent that they purport to apply to national banks. One of the statutes prohibits financial institutions from using employees with lending responsibilities to solicit the sale of insurance. W. Va. Code

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[1] The Commissioner's failure to seek this Court's review is not the only indication that West Virginia is unlikely to enforce the statutes at issue against national banks. As noted above, the former Commissioner supported legislation to repeal the statutes. See p. 3, *supra*. In addition, the current Commissioner not only declined to seek this Court's review but also declined to endorse the petition for rehearing or rehearing en banc that petitioners filed in the court of appeals. See p. 7, *supra*.

§ 33-11A-6 (2000). Another prohibits bank employees from making an insurance-related referral or solicitation of a loan applicant until after the bank has approved the loan. *Id.* § 33-11A-10. The third requires financial institutions to sell insurance products in an area that is separate and distinct from lending and deposit-taking activities. *Id.* § 33-11A-14. As both the OCC and the court of appeals reasoned, those provisions are very disruptive to bank operations, increase bank operating costs and reduce bank efficiency, and significantly impair a bank's ability to solicit and sell insurance products. See Pet. App. 8a, 10a, 62a-66a, 76a-79a. The court of appeals therefore correctly concluded that the provisions would "prevent or significantly interfere with a bank's ability to engage in insurance sales" and solicitation as permitted by federal law and are thus preempted by federal law. Pet. App. 8a; see *id.* at 10a. See also 12 U.S.C. 92; 15 U.S.C. 6701(d)(2)(A); *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25 (1996).

b. Petitioners incorrectly contend (Pet. 14-17) that this Court's review is warranted to resolve a conflict between the unpublished decision of the court below and the First Circuit's decision in *Bowler* v. *Hawke*, 320 F.3d 59 (2003). Contrary to petitioners' contention, there is no conflict between the two decisions.

The two courts did not address the same legal issues. In *Bowler*, the First Circuit held that the court lacked statutory jurisdiction to review the OCC's opinion letter because there was no "regulatory conflict" within the meaning of Section 304(a) of the GLBA, 15 U.S.C. 6714(a). See 320 F.3d at 61 (*reprinted in* Pet. App. 23a-24a). In the instant case, no party raised with the court of appeals whether the dispute between the OCC and the West Virginia Insurance Commissioner was a

"regulatory conflict" within the meaning of 15 U.S.C. 6714(a), and none of the three opinions below addressed that question. See Pet. App. 22a-29a. There is therefore no conflict between the decision below and the decision of the First Circuit on that question.

The court of appeals here apparently concluded that the case presented a justiciable case or controversy under Article III, although only Judge Gregory and Judge King (in dissent) addressed that issue. See Pet. App. 3a-4a (opinion of Gregory, J.); *id.* at 10a (Luttig, J., concurring in the judgment); *id.* at 10a-19a (King, J., dissenting). The First Circuit in *Bowler*, however, did not address that constitutional question, because it concluded that there was no grant of *statutory* jurisdiction under the GLBA. See 320 F.3d at 61 (*reprinted in* Pet. App. 23a-24a). Although *Bowler*'s statutory holding was informed by the First Circuit's doubt whether a finding of statutory jurisdiction would be constitutional, the *Bowler* court avoided rather than resolved the constitutional question. See *id.* at 63-64 (*reprinted in* Pet. App. 29a). Thus, the decision in *Bowler* does not conflict with the resolution of that constitutional question by the court of appeals here. And, even if it did, petitioners argued in the court of appeals that there was a justiciable case or controversy, Supp. Br. of Intervenors 1-3, and they have not raised any jurisdictional issue in their petition for a writ of certiorari. See Pet. i.[2]

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[2] It is not completely clear that a majority of the court of appeals in this case in fact concluded that there was a case or controversy under Article III. Judge Luttig did not address that question, and the judgment of the court, in which he expressly concurred, was dismissal, rather than denial, of the petition for review. Pet. App. 10a. On the other hand, Judge King's opinion, which expressed the view that there was no case or controversy

The court below also held that the West Virginia statutes at issue were preempted by federal law, presumably because, as Judge Gregory explained, they would "prevent or significantly interfere" with national banks' solicitation and sale of insurance. See Pet. App. 7a-9a (opinion of Gregory, J.); *id.* at 10a (Luttig, J., concurring). But the court of appeals in *Bowler* did not pass on either the appropriate standard for preemption or whether the particular state laws at issue were in fact preempted. See 320 F.3d at 60-64 (*reprinted in* Pet. App. 22a-29a). Thus, there is also no conflict between the two decisions on the preemption question.

Petitioners argue that the two courts of appeals made conflicting statements about "whether the OCC has any interpretive authority under GLBA Section 104(d)(2) and thus whether an OCC letter opining that a state insurance law is preempted under that provision has any force or effect." Pet. 14. Any such conflicting statements would not warrant this Court's review, because this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Moreover, there was no opinion for the court in this case, and Judge Gregory's statements about the extent of the OCC's interpretive authority under the GLBA and the legal effect of its opinion letter were not endorsed by Judge Luttig. Thus, the court below made no definitive statements on those issues. The statements of individuals judges in unpublished opinions do

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under Article III, was styled a dissent and was clearly premised on the belief that a majority of the court had concluded that there was a justiciable case or controversy. See *ibid.*; *id.* at 19a. The ambiguity of the holding of the court of appeals on this point is yet another reason why the court's unpublished disposition does not warrant this Court's review.

not provide a sufficient basis to justify this Court's plenary review.

In any event, Judge Gregory's statements that the OCC had authority to issue an opinion letter interpreting the GLBA (Pet. App. 5a) and that the letter was entitled deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944) (Pet. App. 7a), do not conflict with any statements by the First Circuit in *Bowler*. The First Circuit expressly refrained from "resolv[ing] whether the OCC's issuance of the opinion letter was *ultra vires*." 320 F.3d at 62 n.1 (*reprinted in* Pet. App. 27a). And, although the *Bowler* court stated that the OCC opinion letter "constitutes no more than informal agency guidance" and does not "carry[] the force of law" (320 F.3d at 62) (*reprinted in* Pet. App. 27a), that conclusion is fully consistent with Judge Gregory's conclusion that the opinion letter is entitled to *Skidmore* deference. See *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (holding that an "interpretation contained in an opinion letter, * * * which lack[s] the force of law," is "'entitled to respect' under [the Court's] decision in *Skidmore*"). Finally, it bears emphasis that the court of appeals' decision is unpublished and therefore could not, under any circumstance, create a split of binding authority with the First Circuit's *Bowler* decision.

c. Petitioners also err in contending (Pet. 18-23) that the decision of the court of appeals conflicts with this Court's decision in *Barnett*. Because there was no opinion for the court of appeals in this case, it is difficult to ascertain with certainty the reasoning behind the court's holding that the state laws at issue are preempted. But nothing in either the opinion of Judge Gregory or the concurring opinion of Judge Luttig conflicts with *Barnett*. On the contrary, Judge Gregory

concluded that the West Virginia statutes are preempted because they "prevent or significantly interfere" with a national bank's solicitation and sale of insurance, which is among the formulations that this Court used in *Barnett* to describe the threshold for preemption. Compare Pet. App. 8a with 517 U.S. at 33. Judge Luttig did not articulate what preemption standard he was applying, but stated only that he believed that the West Virginia laws are preempted for the reasons given by the OCC. Pet. App. 10a.

Petitioners' contention (Pet. 19-23) that the OCC's preemption analysis is inconsistent with *Barnett* is incorrect. The OCC's preemption analysis is fully consistent with that case. The OCC explained that the governing preemption standards are those "set forth in [this] Court's *Barnett* decision," which entail a determination whether the state laws at issue "prevent or significantly interfere" with, or otherwise stand as an obstacle to, the ability of national banks fully to exercise their powers. Pet. App. 46a-47a.

Although petitioners object (Pet. 19) to the OCC's conclusion (Pet. App. 47a) that a state law "'prevent[s] or significantly interfere[s] with a national bank's exercise of its powers" if it "'unlawfully encroach[es]' on the rights and privileges of national banks; * * * 'destroy[s] or hamper[s]' [their] functions; or * * * 'interfere[s] with or impair[s]' national banks' efficiency in performing authorized functions," that is precisely what this Court held in *Barnett*. See 517 U.S. at 33-34. It is petitioners' contention (Pet. 20-21) that preemption is limited to situations in which the challenged state law "incapacitates" national banks from exercising their powers—not the OCC's opinion letter—that is inconsistent with the Court's analysis in *Barnett*. *Barnett* applied ordinary conflict preemption

principles under which state law is preempted when it "stan[ds] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," not a standard of incapacitation. *Barnett*, 517 U.S. at 31 (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

d. Finally, petitioners are incorrect in arguing (Pet. 23-27) that the decision of the court of appeals conflicts with *Skidmore*. That argument is based on the mistaken premise that the court of appeals "fail[ed] to conduct its own independent analysis." Pet. 24. That premise is flawed for two reasons.

First, it is based on the erroneous view that Judge Gregory's opinion is the opinion of the court. Judge Gregory wrote only for himself, and Judge Luttig's opinion neither addressed whether the OCC was entitled to *Skidmore* deference nor applied the *Skidmore* standard to the OCC's opinion letter.

Second, Judge Gregory's opinion is fully consistent with *Skidmore*. Under *Skidmore*, an agency's opinion may only persuade, not control, a reviewing court, and the agency's power to persuade depends upon such factors as the thoroughness of its consideration, the validity of its reasoning, and the consistency of the action under review with other agency actions. *Skidmore*, 323 U.S. at 140. Here, Judge Gregory explained that he was persuaded by the thoroughness of the OCC's consideration and the validity of its reasoning. Pet. App. 8a-9a. Petitioners have not identified any lack of consistency in the OCC's approach to insurance preemption issues. Thus, no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-1620

IN THE

Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. and NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF OF PETITIONERS

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No. 02-1620

IN THE

Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. and NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONERS

Petitioners the Independent Insurance Agents and Brokers of America, Inc. and the National Association of Professional Insurance Agents, Inc. respectfully submit this Reply to the Brief for the Respondents in Opposition to the Petition for a Writ of Certiorari.

REPLY

I. THE FOURTH CIRCUIT'S JUDGMENT BELOW CONFLICTS WITH THE FIRST CIRCUIT'S DECISION IN *BOWLER*, WARRANTING REVIEW

Respondents make no credible attempt to deny the inescapable conflict between the judgments entered by the Fourth Circuit below and by the First Circuit in *Bowler v. Hawke*, 320 F.3d 59 (1st Cir. 2003). Each court reached exactly the opposite conclusion regarding the force and effect of a letter opinion by the Comptroller of the Currency ("OCC") purporting to preempt state insurance law as applied to national banks and thus rendered squarely conflicting judgments regarding the enforceability of virtually identical state insurance consumer protection laws.

The Fourth Circuit determined that the OCC has sufficient interpretive authority to opine that West Virginia insurance laws are preempted under Section 104(d)(2) of the Gramm-Leach-Bliley Act ("GLBA"), Pub. L. No. 106-102, 113 Stat. 1338 (1999).[1] In its view, an OCC opinion such as the one at issue here has the full force and effect of law unless overturned by a court. Petitioners' Petition For A Writ of Certiorari ("Pet.") at 14-15, Appendix ("Pet. App.") at 4a-6a. The resulting judgment therefore effectively prohibits West Virginia, and perhaps other States in the Fourth Circuit, from enforcing any validly-enacted insurance laws against

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[1] Respondents' allegation that Judge Luttig may not have found an Article III case or controversy, Brief For The Respondents In Opposition ("Opp.") at 12 n. 2, must be rejected. Judge Luttig's agreement with the lead opinion's conclusion on that issue was a necessary predicate to his finding the laws preempted. Had he concluded, as Respondents' posit, that the dispute was not justiciable, he could not have reached the merits of the preemption question.

national banks that the OCC deems preempted. Pet. App. A at 4a; *see also* Pet. at 14-15.

In contrast, on its review of a virtually identical OCC letter opinion concluding that similar provisions of Massachusetts insurance law are preempted, the First Circuit held that the OCC lacks appropriate interpretive authority under GLBA § 104. *Bowler*, 320 F.3d at 62, Pet. App. C at 26a-27a. In the First Circuit's view, such a letter opinion by the OCC is purely advisory and has no effect whatsoever on a State's ability to enforce its insurance laws. *Id.* at 63, Pet. App. C at 27a. For that reason, the First Circuit's resulting judgment effectively permits the continued enforcement of the Massachusetts' insurance consumer protection provisions at issue there. *Id.*, Pet. App. C at 27a; *see also* Pet. at 15.

These two outcomes cannot be reconciled. Contrary to Respondents' contention, the fact that the First Circuit focused on the lack of a justiciable "regulatory conflict" whereas the Fourth Circuit concluded that the case presented a justiciable controversy, *see* Opp. at 11-12, only confirms the conflict. The First Circuit found no "regulatory conflict" based on its conclusion that the OCC opinion was merely non-binding "informal agency guidance." *Bowler*, 320 F.3d at 63, Pet. App. C at 27a. As such, the challenged Massachusetts laws remain fully enforceable against all participants in the insurance industry, including national banks. The Fourth Circuit, on the other hand, not only deemed a similar OCC opinion binding agency action but action sufficiently authoritative to warrant unbridled deference by the courts. That deference produced a final result directly contrary to the result reached by the First Circuit – namely, that the challenged West Virginia state laws are *not* enforceable against national banks in that State. Respondents' notion that two decisions with exactly opposite outcomes regarding the enforceability of similar state laws

do not present squarely conflicting judgments therefore must be rejected. *See also* Pet. at 14-16.

Resolution by this Court of the conflict is essential to the future functioning of the regulatory regime that Congress established under the GLBA. *See* Pet. at 16-17. The conflict creates confusion over the appropriate roles of state and federal regulators vested with authority under that statute. Moreover, the application of conflicting standards to the type of consumer protections implicated here threatens to dismantle the entire body of important state consumer protection regulation that has been in place in the States for well over a century. Finally, because at least 15 other States have laws in place that are substantively identical to one or more of the provisions at issue here and in *Bowler*, resolution of this case affects the continued ability of other state insurance departments to exercise their traditional police power to regulate the sale of insurance within their borders.[2]

II. PETITIONERS HAVE A RIGHT TO SEEK REVIEW OF THE CONFLICT

Unable to deny the obvious circuit conflict, Respondents instead contend that Petitioners are not proper parties to

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[2] Review also is warranted because the Fourth Circuit's judgment conflicts with this Court's decisions in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Pet. at 18-27. Respondents make no serious attempt to refute these conflicts. They fail, for example, to respond to a single of Petitioners' cases from which the *Barnett* standard was derived, Pet. at 19-22, and instead summarily assert that, because the OCC (and Fourth Circuit) summarily *claimed* to apply *Barnett*, their conclusions were correct. Opp. at 15. Respondents likewise fail to articulate how the Fourth Circuit in any manner conducted the independent judicial review that *Skidmore* requires.

invoke this Court's certiorari jurisdiction. Specifically, they make the novel contention that a person whose intervention was *granted* cannot seek review under 28 U.S.C. § 1254 unless this Court first reviews the propriety of the grant of intervention. *See* Opp. at 7-8. As an initial matter, it is noteworthy that Respondents have not preserved their challenge to the Fourth Circuit's grant of Petitioners' original motion to intervene through the filing of a cross-petition for a writ of certiorari on that question. Moreover, Petitioners are proper parties before this court in any event because they unquestionably satisfy both the constitutional and prudential standing requirements necessary for this action to proceed even absent the parties on whose behalf they intervened.

The Fourth Circuit granted Petitioners' intervention motion below following full briefing by both Petitioners and Respondents and no objection from West Virginia. Section 1254 expressly allows any "party" to seek certiorari, and this Court has made clear in the context of § 1254 that intervenors in lower federal courts may seek review on their own. *Maine v. Taylor*, 477 U.S. 131, 136 (1986). *See also Schneider v. Dumbarton Developers Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985) ("When a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party."); 9 Moore's Federal Practice ¶ 203.06 pp. 3-20 (1987) ("One who is not an original party to a lawsuit may of course become a party by intervention.").

That the parties on whose side Petitioners intervened – the Insurance Commissioner and State of West Virginia – have elected not to participate in the Petition does not render Respondents' assertion any more legitimate. It is well-settled that "intervenors in lower federal courts may seek review in this Court *on their own*, so long as they have 'a sufficient stake in the outcome of the controversy' to satisfy the constitutional requirement of genuine adversity." *Taylor*,

477 U.S. at 136 (quoting *Bryant v. Yellen*, 447 U.S. 352, 368 (1980)) (emphasis added). Even in *Diamond v. Charles*, 476 U.S. 54, 61 (1986) – the only case cited by Respondents on this point involving a party whose intervention motion had been granted below[3] – the Court made clear that a party granted intervention below may in fact proceed regardless of whether the party on whose behalf they intervened is still present in the action as long as the intervenor can demonstrate Article III standing. *Diamond* thus *supports* Petitioners' ability to proceed notwithstanding West Virginia's decision not to appeal. *See* 476 U.S. at 68 (intervenor may initiate appeal absent party on whose side he intervened if he can demonstrate Article III standing); *see also Lloyd v. Alabama Dept. of Corrections*, 176 F.3d 1336, 1339 n.2 (11th Cir. 1999) (noting same).

There is no question that Petitioners satisfy the standing requirements of both Article III as well as any additional prudential standing requirements necessary for this action to proceed. Article III requires a federal plaintiff to show three factors: (1) "injury in fact," a harm suffered by the plaintiff that is concrete and actual or imminent; (2) "causation," a fairly traceable connection between the injury and the conduct of the defendant; and (3) "redressability," a likelihood that requested relief will redress the alleged injury. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102-104 (1998).

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[3] Respondents' only other authorities on this point involved petitioners that had been *denied* leave to intervene below. *See* Opp. at 7-8 (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (because petitioner failed to appeal denial of motion to intervene, Court could not review); and *International Union, United Automobile Workers v. Scofield*, 382 U.S. 205 (1965) (Court is permitted to review orders denying intervention)).

Where, as here, the petitioning parties are trade associations, the relevant inquiry is whether their members possess standing in their own right.[4] The injury that Petitioners' member organizations are suffering is economic in nature. Specifically, their members are subject to state insurance regulations in West Virginia that no longer apply to national banks. The banks' unrestrained entry into the marketplace for general insurance in West Virginia affords them a significant competitive edge over Petitioners' members. Their members' stake in the outcome of this case is so substantial that Petitioners initiated exactly the same claims against Respondents in the U.S. District Court for the District of Columbia prior to West Virginia's commencement of its lawsuit in the Fourth Circuit. *Independent Ins. Agents of Am., Inc. v. Hawke*, No. 01-cv-02356 (D.D.C.) (filed November 13, 2001).[5]

The causation requirement is easily met and is unchallenged by Respondents. The banks' unrestrained entry into the marketplace is traceable to the challenged OCC Preemption Opinion, which removed those restraints by deeming them preempted and anticipating reliance on that conclusion by national banks.

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[4] Courts also look at two additional factors for association standing: whether the interests that the suit seeks to vindicate are germane to the association's objectives; and whether the participation of individual members is necessary for the relief requested. *Hunt v. Washington Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Respondents do not dispute the presence of these factors and, furthermore, they are easily met. Petitioners regularly advocate on behalf of their members in both legislative and judicial arenas; and, because only injunctive relief is sought, the participation of individual members in this lawsuit is unnecessary.

[5] Notably, neither in D.C. District Court nor in the Fourth Circuit did Respondents challenge Petitioners' constitutional standing.

Finally, a decision by this Court in Petitioners' favor – on either the agency authority issue or the merits of the preemption dispute – is likely to redress Petitioners' injuries. Specifically, if this Court agrees that the OCC lacked authority to issue an opinion purporting to preempt state law under GLBA § 104(d)(2) and reverses the Fourth Circuit, then the now-preempted West Virginia laws once again become enforceable against national banks, thereby removing the economic threat to Petitioners' members caused by non-enforcement. Even if the Court disagrees with Petitioners regarding the OCC's authority, however, a finding in their favor on the merits of the preemption question also produces the same result.

Respondents' sole argument on redressability is their speculation that Petitioners "might have difficulty" establishing that West Virginia will in fact enforce its laws. Opp. at 10. That hypothesis, however, is contrary to the basic presumption that a State will enforce the laws that its legislature enacts. *See, e.g., Taylor*, 477 U.S. at 136-37 (finding State's stake in litigation substantial because "a State clearly has a legitimate interest in the continued enforceability of its own statutes").

To satisfy the redressability requirement of Article III, moreover, Petitioners must show only that a favorable decision is *likely* to redress their injury, not that a decision *will inevitably* lead to that result. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78 (1978) ("Nothing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief."). In *Duke Power*, for example, the Court found it unnecessary for the plaintiffs to rebut claims about what *might have happened* had Congress not enacted legislation limiting

liability for nuclear accidents. *Id.* at 77-78. By the same token, it is not necessary for Petitioners to answer Respondents' hypothesis that the West Virginia Insurance Commissioner – who initiated the Fourth Circuit lawsuit and consistently argued that the laws at issue were *not* preempted – might choose not to enforce them.[6]

Insofar as prudential standing is concerned, Petitioners also meet the "zone of interests" test that this Court has articulated to resolve that inquiry. *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (prudential standing exists where "the interest sought to be protected by the complainant [is] arguably within the zone of interests to be protected or regulated by the statute . . . in question"). The GLBA subjects Petitioners' members, like all financial institutions, to regulation according to the financial functions in which they participate. *See* Pet. at 7-11 (discussing GLBA's regulatory regime). The OCC has interpreted the GLBA to Petitioners' detriment. Petitioners have prudential standing under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, to challenge that interpretation, as they do to challenge any administrative agency interpretation of a statutory scheme that subjects their members to regulation and directly affects their economic interests. *National Credit*, 522 U.S. at 488-89 (competitors of financial institutions had prudential standing under the APA to challenge agency action that relaxed restrictions on those institutions).

That the statutory provision on which West Virginia relied to initiate its petition in the Fourth Circuit – GLBA § 304, 15 U.S.C. § 6714 – establishes a specific, expedited

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[6] Commissioner Cline's decision not to seek this Court's review just as likely may have been a question of how best to spend limited resources than the silent statement of her "acquiescence" that Respondents assume it to be.

procedural mechanism for one GLBA functional regulator to challenge another is irrelevant. The addition of this mechanism to the repertoire of tools available to regulators to carry out their roles under the GLBA took nothing away from the substantive or procedural rights of non-regulators and therefore does not justify depriving Petitioners of their right to challenge final agency action as the tenets of administrative law unquestionably permit them to do. *See, e.g., NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251 (1995) (reviewing OCC's position as expressed in a letter opinion); *Independent Ins. Agents of America v. Hawke*, 211 F.3d 638 (D.C. Cir. 2000) (same); *Student Loan Marketing Ass'n v. Riley*, 104 F.3d 397, 405 (D.C. Cir. 1997) (agency interpretation set forth in letter opinion is final action if approved by agency head, subject to formal agency process and not labeled tentative).

CONCLUSION

For the foregoing reasons and those discussed in the Petition, Petitioners respectfully urge this Court to grant the requested Writ of Certiorari.

Respectfully submitted,

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In The
Supreme Court of the United States

INDEPENDENT INSURANCE AGENTS AND BROKERS OF AMERICA, INC. and NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, INC.,

Petitioners,

v.

JOHN D. HAWKE, in his capacity as Comptroller of the Currency of the United States, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States of America,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 37, the National Association of Insurance Commissioners (NAIC)[1] submits this Brief in support of petitioners, the Independent Insurance Agents and Brokers of America, Inc. and the National Association of Professional Insurance Agents, Inc., in respectfully requesting that the Court issue a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit entered in this action.

INTEREST OF THE AMICUS CURIAE

The NAIC is comprised of the chief insurance regulators of the 50 States, the District of Columbia, and four United States territories. The NAIC acts to support regulators in achieving fundamental objectives relating to insurance regulation, of which consumer protection is paramount.

The NAIC's interest in this litigation concerns a standard for preemption of State laws contained in an opinion letter regarding West Virginia insurance statutes issued by the Office of the Comptroller of the Currency (OCC) and upheld by the Fourth Circuit. The NAIC believes the Fourth Circuit's affirmation of a low threshold for preemption of State insurance laws sets a dangerous precedent and contravenes the intent of Congress in enacting Section 104(d)(2)(A)[2] of the Gramm-Leach-Bliley Act (GLBA).[3]

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[1] Pursuant to Supreme Court Rule 37.2(a), parties to this action consent to the filing of this Brief. Letters of consent accompany this Brief. Pursuant to Supreme Court Rule 37.6, this Brief was authored in whole by undersigned counsel for the NAIC. No person, other than the amicus curiae, made a monetary contribution to the preparation or submission of the Brief.

[2] 15 U.S.C. § 6701(d)(2)(A) (Supp. 2001). For familiarity of reference, when referring to a section of the Gramm-Leach-Bliley Act

(Continued on following page)

Such summary affirmation of the OCC's low preemption threshold also conflicts with a decision issued in an action in the United States Court of Appeals for the First Circuit concerning an OCC preemption opinion involving Massachusetts law.[4] Further, the NAIC is aware of pending requests for OCC preemption opinions relating to Louisiana, Puerto Rico, and Rhode Island law. Because of the threat of additional preemption opinions being issued and the employment of this low preemption threshold that potentially erodes power of the State insurance regulators to protect insurance consumers, the NAIC seeks to appear before this Court.

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1997), ensures that States shall regulate the business of insurance, unless Congress specifically provides otherwise. That the business of insurance remains within the preserve of State regulation is a fundamental principle of "functional regulation," under which all insurance activities are regulated by State insurance commissioners whether carried out by insurers or banks. The concept of functional regulation is codified in GLBA. Specifically regarding insurance regulation, GLBA re-affirmed the applicability of the McCarran-Ferguson Act subject to certain preemption rules, one of which is at issue presently.

State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks are addressed by Section 104(d)(2)(A), which provides for their

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(GLBA), this Brief refers to sections of GLBA by their section numbers within that legislation as opposed to where codified within the United States Code.

[3] Pub. L. No. 106-102, 113 Stat. 1338 (Nov. 12, 1999).

[4] *See Bowler v. Hawke*, 320 F.3d 59 (1st Cir. 2003).

preemption in limited circumstances. As the NAIC will explain, Congress codified a high "prevent or significantly interfere" threshold for preemption of State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. To avoid the outcome whereby State laws are subjected to a preemption threshold unintended by Congress, the NAIC supports petitioners in respectfully requesting that this Court issue a writ of certiorari in this matter.

SUMMARY OF ARGUMENT

The Fourth Circuit upheld an opinion letter by the OCC, which erroneously states the legal standard for preemption of State laws relating to insurance sales, solicitation, and cross-marketing activities by national banks. Congress codified the landmark "prevent or significantly interfere" standard articulated by the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). If accepted by this Court, the OCC's standard, under which virtually any interference by a State law results in preemption, would set a dangerous precedent under which the OCC could preempt State laws in a manner wholly contrary to Congress' intent in establishing the functional regulation framework in GLBA.

ARGUMENT

I. UNDER GLBA, STATES CONTINUE TO REGULATE THE BUSINESS OF INSURANCE.

The central regulatory principle codified within GLBA is "functional regulation." From an insurance perspective,

functional regulation means that State insurance regulators will regulate the business of insurance. Section 301[5] explicitly states that "[t]he insurance activities of *any person (including a national bank . . .)* shall be functionally regulated by the States, subject to section 104" (emphasis added). Section 104, "Operation of State Law," establishes a strong presumption in favor of State insurance regulation by explicitly re-affirming the McCarran-Ferguson Act, clearly stating that it "remains the law of the United States." 15 U.S.C. § 6701(a) (Supp. 2001).

Within the McCarran-Ferguson Act, Congress "declare[d] that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. § 1011 (1997). Further, "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a) (1997).

State insurance regulation, therefore, is a Congressional delegation. In GLBA, Congress expressly preserved and reiterated State regulation of the business of insurance. Thus, the provisions of GLBA relating to preemption of State laws concerning the insurance activities of national banks must be read against the longstanding Congressional policy that insurance activities be regulated at the State level regardless of who is conducting the business of insurance.

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[5] 15 U.S.C. § 6711 (Supp. 2001).

II. CONGRESS ESTABLISHED A "PREVENT OR SIGNIFICANTLY INTERFERE" PREEMPTION STANDARD FOR STATE LAWS RELATING TO CERTAIN INSURANCE ACTIVITIES BY NATIONAL BANKS.

A. In enacting GLBA, Congress codified "prevent or significantly interfere" as the preemption standard.

Courts examine the preemptive effect of State law upon national bank activities using ordinary preemption principles, under which a court's "sole task is to ascertain the intent of Congress" with respect to preemption. *California Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 280 (1987). By enacting GLBA, Congress codified an explicit preemption standard derived from the Supreme Court's decision in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996). Section 104(d)(2)(A) states:

> In accordance with the legal standards for preemption set forth in the decision of the Supreme Court of the United States in [*Barnett*], no State may, by statute, regulation, order, interpretation, or other action, prevent or significantly interfere with the ability of a depository institution, or an affiliate thereof, to engage, directly or indirectly, either by itself or in conjunction with an affiliate or any other person, in any insurance sales, solicitation, or crossmarketing activity.

Where Congress codifies a standard, courts must respect the unambiguous statutory language. In interpreting statutes, courts "begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Further, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* Here, Section

104(d)(2)(A) expresses a clear and unambiguous preemption formulation through the words "prevent or significantly interfere."

The reference to *Barnett* in GLBA reinforces, rather than alters, the plain language of "prevent or significantly interfere." The structure of Section 104(d)(2)(A) establishes this fact. The dominant part of Section 104(d)(2)(A) is the clause stating that "no State may . . . prevent or significantly interfere with" a national bank's ability to engage in any insurance sales, solicitation, or cross-marketing activities. The "in accordance with" clause is subordinate to this principal clause. The principal "prevent or significantly interfere" clause sets the standard, and the subordinate clause indicates Congress' belief (and resulting statutory intent) that such clause is to be read and understood to be "in accordance" with the *Barnett* decision. Any contrary interpretation inverts the proper reading of the Section 104(d)(2)(A) preemption rule, making the "prevent or significantly interfere" clause subordinate to the "in accordance with" clause.

In choosing to tie *Barnett* to "prevent or significantly interfere" within Section 104(d)(2)(A), Congress declares its legislative intent to codify the words "prevent or significantly interfere" as well as its interpretation that *Barnett* means "prevent or significantly interfere." Of all of the supposed variety of preemption standards discussed in *Barnett*, Congress codified one to apply to the laws at issue here. To the extent that there may be any ambiguity concerning "prevent or significantly interfere," Congress settles the matter. Only by applying the "prevent or significantly interfere" standard will courts properly maintain Congress' clearly expressed intent.

B. The "prevent or significantly interfere" standard is consistent with, and required by, "the legal standards for preemption set forth in . . . Barnett."

1. The preemption standards of *Barnett* direct courts to determine the intent of Congress with respect to the preemption of State laws in GLBA.

Barnett, like all Supremacy Clause cases, sought to resolve only one issue. "This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State?" *Barnett*, 517 U.S. at 30.

In *Barnett*, this was a fairly laborious task, because "the Federal Statute" in question, the National Bank Act, did not *specifically* address resolution of a perceived conflict between that statute and a State law. Lacking clear Congressional intent regarding the preemptive effect of federal law, the Supreme Court engaged in a detailed analysis of preemption jurisprudence. The Court noted that federal statutes sometimes reveal an explicit Congressional intent regarding preemption (as with GLBA), but more often (unlike GLBA), they do not. *Id.* at 31. The latter situation, where federal preemption may be implicit, requires a court to uncover Congressional intent from such factors as statutory structure, pervasiveness of the federal scheme, irreconcilable conflicts between State and federal law, and whether State law "stand[s] as an obstacle to the . . . full purposes and objectives of Congress." *Id.* (citations omitted).

In the course of its preemption analysis, the Supreme Court also articulated a legal preemption standard specific to activities by national banks, prevent or significantly

interfere, which plainly establishes a high bar for preemption:

> In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to *forbid, or to impair significantly*, the exercise of a power that Congress explicitly granted. To say this is not to deprive states of the power to regulate national banks, where (unlike here) doing so does not *prevent or significantly interfere* with the national bank's exercise of its powers.

Barnett, 517 U.S. at 33 (emphasis added, citations omitted). Whereas the discussion of other legal standards for preemption related to cases where Congress left a statutory ambiguity about its preemptive effect, Section 104(d)(2)(A) creates no such ambiguity. Congress stated a clear "prevent or significantly interfere" standard, removing the need to sift through an analytical morass created by a lack of clarity "unlike here" in *Barnett*, and clarifying the degree to which Congress intended "to set aside the laws of a State." 517 U.S. at 30. Unlike in *Barnett*, GLBA specifically addresses preemption with a simple standard: Does the State law in question "prevent or significantly interfere" with the ability of a national bank to engage in the enumerated insurance activities?

Vindicating the "prevent or significantly interfere" standard is entirely consistent with *Barnett*'s preemption analysis, particularly its discussion of *Hines v. Davidowitz*, 312 U.S. 52 (1941). *Hines* asked whether a State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 67; *see also Barnett*, 517 U.S. at 31. Understood properly, the *Hines* "stands as an obstacle" test should not be used to dilute the "prevent or significantly interfere" preemption rule articulated by the Court and established by

GLBA for bank insurance sales activities. Rather, the *Hines* formula applies to situations where a court analyzes whether the inconsistency between a State law and a federal law's preemptive intent is such that the State law must give way. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Hines*, 312 U.S. at 67. Lacking clear statutory guidance about Congress' preemptive intent, *Barnett* found the State law in question to be an "obstacle" to Congress' "full purposes and objectives" concerning preemption. By contrast, Section 104(d)(2)(A) gives very clear direction to courts as they determine the "full purposes and objectives of Congress" with respect to the threshold for preemption. Congress' "full purposes and objectives" regarding preemption are clearly spelled out with respect to the relationship between federal and State law by Section 104(d)(2)(A) and other sections of GLBA. These "full purposes and objectives" include: the explicit reaffirmation of the McCarran-Ferguson Act; the codification of the concept of "functional regulation"; and, to effectuate functional regulation, a high presumption in favor of State regulation under the "prevent or significantly interfere" preemption standard.

Thus, the "legal standards for preemption set forth in . . . Barnett" as required by Section 104(d)(2)(A) become clear. Courts are to ascertain Congress' intent with respect to preemption by evaluating the "*full* purposes and objectives" of Congress in passing the statute (emphasis added). Through its application of the "stands as an obstacle" test, the only "purpose and objective" the OCC appears to validate is the right of banks to sell insurance. Through *Barnett* and GLBA, however, the relevant test is not whether State law "stands as an obstacle" to the bank's ability to sell insurance; rather, it is whether State law "stands as an obstacle" to Congress' intent with respect to the preemption or preservation of State law. This intent is explicitly expressed in GLBA: State regulation prevails

unless it is so burdensome that it "prevents or significantly interferes" with a bank's ability to sell insurance. Congress understood *Barnett* to have established a "prevent or significantly interfere" standard with respect to State regulation of bank insurance sales activities, and it explicitly codified this standard. Understood in this context, *Barnett*'s "legal standards" for preemption become clear and its discussion of *Hines* should not be viewed as a tool for abrogating the plain language of GLBA. *Hines* simply illustrates that courts interpreting GLBA should apply Congress' specific "purposes and objectives," including its high "prevent or significantly interfere" threshold for those wishing to preempt the dominant power of the States as the functional regulator of insurance. From the Supreme Court's discussion encompassing "prevent or significantly interfere," there can be no doubt that it serves as the foundation of a high preemption threshold.

Furthermore, the language in Section 104(d)(2)(C)(iii),[6] which states that "[n]othing shall be construed . . . to limit the applicability of" *Barnett*, only buttresses the argument that *Barnett* and GLBA stand for "prevent or significantly interfere." A preemption standard that ignores the "prevent or significantly interfere" standard "limits" the applicability of *Barnett*. In light of *Barnett*'s use of "prevent or significantly interfere" and Congress' codification of this standard, the only logical conclusion is that the preemption standard to be gleaned from *Barnett* is the one that Congress codified: prevent or significantly interfere.

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[6] 15 U.S.C. § 6701(d)(2)(C)(iii) (Supp. 2001).

2. "Prevent or significantly interfere" was widely understood to be the rule in *Barnett* before Congress codified this standard in GLBA.

A review of the language in preemption cases both before and after *Barnett* makes clear that the "prevent or significantly interfere" preemption standard was a unique formulation. A Westlaw search for the phrase "prevent or significantly interfere" uncovered no cases relevant either to preemption of State law or State regulation of bank insurance activities before *Barnett*. The lower courts recognized that *Barnett* was a seminal case; a post-*Barnett* Westlaw search shows that courts applying the Supremacy Clause in preemption cases used the "prevent or significantly interfere" standard at least seven times. *See, e.g., Valley Nat'l Bank v. Lavecchia*, 59 F. Supp. 2d 432, 436 (D.N.J. 1999) ("The *Barnett* court held that Section 92 is not subject to limitation by a state statute that would prevent or significantly interfere with the national bank's exercise of its powers."); *New York Bankers Ass'n, Inc. v. Levin*, 999 F. Supp. 716, 718 (W.D.N.Y. 1998) (quoting *Barnett*, 517 U.S. at 33) ("The [*Barnett*] Court held that although a State may regulate national banks doing business within a State's jurisdiction, a state may not 'prevent or significantly interfere with the national bank's exercise of its [federally conferred] powers.'").

Furthermore, a review of the scholarly literature also shows that "prevent or significantly interfere" was commonly understood to be the rule established in *Barnett*. *See, e.g.*, Jeffrey H. Thomas, *Barnett Bank Brings the Business of Insurance to the Attention of Congress*, 20 U. Ark. Little Rock L.J. 129, 140 (1997) ("Accordingly, national banks may sell insurance pursuant to Section 92 subject to Comptroller regulation and state regulation as

long as the state regulation 'does not prevent or significantly interfere with the national bank's exercise of its powers.'" (footnote omitted)); Linda Birkin Tigges, *Functional Regulation of Bank Insurance Activities: The Time Has Come*, 2 N.C. Banking Inst. 455, 466 (1998) ("The OCC acknowledges that the Court in Barnett indicated that their decision did not 'deprive [s]tates of the power to regulate national banks where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers.'" (footnote omitted)). Even OCC attorneys, in discussing *Barnett* in a scholarly work, recognized that "it seems clear from Barnett and the related cases that state law should not apply where the law significantly qualifies the exercise of a national bank's powers. . . ." Julie L. Williams, Stuart E. Feldstein & Karen E. McSweeney, *After Barnett: The Intersection of National Bank Insurance Powers and State Regulation*, 1 N.C. Banking Inst. 13, 28 (1997). Therefore, the courts, legal scholars, and even the OCC recognized the importance of the "prevent or significantly interfere" standard articulated in *Barnett*.

C. The statutory context of "prevent or significantly interfere" indicates its heightened threshold for preemption of certain statutes.

Another consideration with respect to the language of Section 104(d)(2)(A) is the use of similar but different language in nearby sections relating to State laws and bank insurance activities. Section 104(c)(1)[7] explains that except as otherwise provided, no State may "prevent or

[7] 15 U.S.C. § 6701(c)(1) (Supp. 2001).

restrict" affiliations concerning banks and affiliates. Section 104(d)(1)[8] provides that (with exceptions, including sales, solicitation, and cross-marketing activities) States may not "prevent or restrict" a bank or its affiliates from engaging in permissible activities. Despite using the phrase "prevent or restrict" in nearby sections, Congress codified "prevent or significantly interfere" in Section 104(d)(2)(A). Surely, use of the phrase "significantly interfere" meant something. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *See Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *Independent Bankers Ass'n of America v. Farm Credit Administration*, 164 F.3d 661, 667 (D.C. Cir. 1999) (quoting *Russello*, 464 U.S. at 23).

By directly tying the "prevent or significantly interfere" standard to certain types of laws, Congress singled out these laws for heightened protection against preemption, and emphasized the principle that only "significant" interference would place the types of laws mentioned in Section 104(d)(2)(A) at risk of preemption.

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[8] 15 U.S.C. § 6701(d)(1) (Supp. 2001).

III. THE LEGISLATIVE HISTORY ILLUMINATES CONGRESSIONAL INTENT TO CODIFY A HIGH "PREVENT OR SIGNIFICANTLY INTERFERE" PREEMPTION STANDARD.

A. The GLBA Senate Report is based on a clearly erroneous reading of *Barnett*, which conflicts with the plain language of GLBA.

The Senate Report[9] accompanying GLBA contains an erroneous description of *Barnett*. The OCC depends upon this Report to support its construction of Section 104(d)(2)(A), contending that the two are "almost identical." *See* Pet. App. at 44a. Before a clear interpretive error becomes part of judicial precedent, the Court should clarify the meaning of the legislative history of Section 104(d)(2)(A). The Senate Report states that:

> There is an extensive body of case law related to the preemption of State law. For example, in Barnett Bank of Marion County, N.A. v. Nelson, 116 S. Ct. 1103 (1996), the U.S. Supreme Court noted that Federal courts have preempted State laws that "prevent or significantly interfere" with a national bank's exercise of its powers; that "unlawfully encroach" on the rights and privileges of national banks; that "destroy or hamper" national banks' functions; or that "interfere with or impair" national banks' efficiency in performing authorized functions.

S. Rep. No. 106-44 at 13.

The language in the Senate Report is not "almost identical" to the language of Section 104(d)(2)(A). Simply put, Section 104(d)(2)(A) gives precisely one formulation of the preemption standard: "prevent or significantly interfere." The Report gives at least four.

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[9] S. Rep. No. 106-44 (1999).

Of greater concern are the subtle but essential legal mistakes made by the Report's drafter. The Report states that in *Barnett*, the Supreme Court "noted that Federal courts have preempted State laws that 'prevent or significantly interfere' with a national bank's exercise of its powers," and lists three other formulations under which federal courts purportedly preempted State laws. *See* S. Rep. No. 106-44 at 13. The cases from which those phrases are quoted are cases where courts *upheld*, rather than *preempted*, State laws. *See Anderson Nat. Bank v. Luckett*, 321 U.S. 233, 247-252 (1944); *McClellan v. Chipman*, 164 U.S. 347, 358 (1896); and *National Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869). In fact, *Barnett* explicitly "noted" that these were cases – which it quoted in a string citation that followed the articulation of the "prevent or significantly interfere" standard – where State laws were *not* preempted. *See Barnett*, 517 U.S. at 34 ("[W]here (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers.").

In fact, the preemption standards in those cases all set a high bar for setting aside a State law. *See Anderson*, 321 U.S. at 252 (The infringement was not found to rise to an impermissible level, because it did not rise to the level of an "unlawful encroachment."); *McClellan*, 164 U.S. at 358 ("[A]ny limitation by a state on the making of contracts is a restraint upon the power of a national bank . . . but the question which we determine is whether it is such a regulation as violates the act of congress."); *National Bank*, 76 U.S. (9 Wall.) at 362 ("It is only when State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.").

By lumping "prevent or significantly interfere" in with at least three other standards mentioned in *Barnett*, the Report dilutes the meaning of "prevent or significantly interfere." If the string citation cases illustrate anything, however, it is that the Supreme Court deliberately tied the words "prevent or significantly interfere" to cases

signifying that a high level of interference is required before the Supreme Court will preempt State law.

B. The GLBA Senate Report is not persuasive legislative authority.

Not only is the above-quoted passage of the Senate Report based on a demonstrably erroneous statement of the legal standard established by *Barnett*, a proper understanding of GLBA's legislative history indicates it is not controlling authority. In fact, the part of the Report that analyzes the actual text of the bill section-by-section contains no reference to the *Barnett* string citation, but in relevant part states, rather succinctly and correctly, the preemption rule stated in *Barnett* – that "prevent or significantly interfere" provides the controlling language.[10] Because "inconsistent history certainly cannot override plain language," the incorrect explanation of *Barnett* on page 13 of the Senate Report must be discarded. *Qi-Zhou v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995).

Additionally, the United States Senator who authored Section 104(d)(2)(A), Senator Richard Bryan, took issue with page 13 of the Senate Report. With respect to the *Barnett* language, Sen. Bryan stated that "[t]he Committee Print disregarded the Supreme Court's holding in [*Barnett*], regarding the standard for preempting State regulation of insurance sales activity." 145 Cong. Rec. S6046 (daily ed. May 26, 1999) (statement of Sen. Bryan).

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[10] "Section 104(d)(2)(A) then establishes the general preemption rule that applies to state regulation of insurance sales, solicitation or cross-marketing activities. In accordance with the legal standards for preemption set forth in the decision of the Supreme Court [in *Barnett*], no State may prevent or significantly interfere with the ability of an insured depository institution, or a subsidiary or affiliate thereof, to engage in insurance sales, solicitation and cross-marketing activities." S. Rep. No. 106-44 at 22.

Sen. Bryan made clear he was referring to the *Barnett* string citation erroneously summarized on page 13. "The 'prevent or significantly interfere' language was taken directly from the Supreme Court's Barnett decision and is intended to codify that decision." *Id.* He further noted that the Report "attempts to clarify the core preemption standard in a way that is contrary to the meaning of the provision." *Id.* Referencing the language concerning impairment of national banks' efficiency, Sen. Bryan stated that the

> paraphrase . . . is correct [sic] and harmful. It is incorrect because it implies that it applies to any authorized function. . . . [It] is harmful because it could dramatically expand the scope of the preemption provision. It could do so if read to prohibit the application of any State law that impairs a national bank's or its affiliate's or subsidiary's efficiency in selling insurance. The Barnett opinion does not support any such reading.

Id. at S6046-S6047. Sen. Bryan's comments should remove any confusion created by the incorrect use of the *Barnett* string citation.

Given his role as author of Section 104(d)(2)(A), Sen. Bryan's clarifying words are entitled to significant deference. "As a statement of one of the legislation's sponsors, this explanation deserves to be accorded substantial weight in interpreting the statute." *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (citations omitted). Another case stated that the statements of the Senate manager of a piece of legislation were to be afforded "great weight." *Browder v. Tipton*, 630 F.2d 1149, 1151-1152 (6th Cir. 1980) (footnote omitted).

Further, the Conference Report[11] is consistent with Sen. Bryan's remarks, and contains no reference to the

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[11] H.R. Conf. Rep. No. 106-434, *reprinted in* 1999 U.S.C.C.A.N. 245.

Barnett string citation. The Conference Report states succinctly the interpretive rule: "With respect to insurance sales, solicitations, and cross-marketing, States may not prevent or significantly interfere with the activities of depository institutions or their affiliates, as set forth in *Barnett*. . . . " H.R. Conf. Rep. No. 106-434 at 5, *reprinted in* 1999 U.S.C.C.A.N. at 251.

The relationship between the Senate Report and the Conference Report indicates that any conflict should be resolved in favor of the unambiguous Conference Report. "The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body." *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 537 (7th Cir. 1991). The reason for looking to the Conference Report is that "when choosing between inconsistent pieces of legislative history, two houses are better than one." *Id.* In this case, the Conference Report clearly articulates the interpretive rule the Senate Report misstates. "Given the clear language of the statute, selected and arguably ambiguous snippets of the legislative history are insufficient to undermine that language." *Independent Bankers*, 164 F.3d at 668 (citation omitted). Thus, the overwhelming conclusion is that the standard for preemption of State laws affecting insurance sales, solicitation, and cross-marketing activities of national banks is "prevent or significantly interfere," and that this standard establishes a high bar for anyone challenging such a law to meet.

IV. THE OCC'S INTERPRETATION OF GLBA IS NOT ENTITLED TO DEFERENCE.

The OCC's interpretation of Section 104(d)(2)(A) is not entitled to deference typically associated with matters within an agency's expertise. First, there is no indication that Congress granted the OCC sweeping preemption authority through flawed interpretations of statutory and judicial standards.

Second, the OCC's interpretation of a provision of GLBA falls outside the scope of the deference typically granted to agencies. *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837 (1984), is the seminal federal case on deference to agency interpretations of federal statutes. The standard of agency review concerned "an agency's construction of the statute it administers. . . . " *Id.* at 842. The Supreme Court noted that "[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. . . ." *Id.* at 844. GLBA, however, is not a statute for the OCC to administer. Whatever interpretive deference may afforded the OCC for statutes within Title 12 of the U.S. Code, the Banks and Banking Code, cannot be said to extend to Section 104(d)(2)(A), which resides in Title 15.

The Fourth Circuit deferred to the OCC's interpretation on the grounds that its opinion met the standard for "persuasiveness" under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The Fourth Circuit's perfunctory deference to the OCC's interpretation did not indicate why the OCC's opinion was "persuasive." As demonstrated above, the OCC's interpretation is so contrary to the plain language of Section 104(d)(2)(A), preemption jurisprudence, and Congressional intent that its opinion cannot be held to have the "power to persuade." *Skidmore*, 323 U.S. at 140.

Additionally, this is not a case where Congress has given a federal agency "a unique role in determining the scope of [a statute's] preemptive effect." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-496 (1996). Nor does the OCC "bring the benefit of specialized experience" in giving meaning to the words "prevent or significantly interfere." *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). GLBA does not give the OCC the authority to interpret GLBA. Whatever authority the OCC may have with respect to opining on the effect of State laws on banking activities does not extend to GLBA itself, and it certainly does not extend to nullifying unilaterally the words

"prevent or significantly interfere." While there is a preemption standard stated in GLBA, it is for the courts to apply, not the OCC. The Fourth Circuit, however, did not apply the "prevent or significantly interfere" standard to the laws at issue, but accepted at face value the OCC's conclusions based on a misapplication of Congress' clearly expressed will. In order to restore Congressional intent, it is important that this Court vindicate that preemption standard lest it be improperly re-fashioned into a tool to abrogate state law.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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